No. 282

LIBRARY
SUPREME COURT, U.S.

To be argued by
GEORGE S. LEISURE, JR.

Office - Supreme Court, U.S.
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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v-

SALVATORE APUZZO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

GEORGE S. LEISURE, JR.,
Assistant United States Attorney, Of Counsel.

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Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York after a trial before Honorable Edward J. Dimock and a jury.

The appellant was tried on two informations: Information No. C 145-283 charging the appellant in two counts with (a) failure to pay the special tax imposed upon persons engaged in the business of accepting wagers and (b) failure to register to pay the tax; and Information No. C 147-278 charging the defendant in one count with conspiring to commit those crimes. The statutes violated are Title 26, United States Code, Sections 2707(b), 3277, 3290, 3291(a), 3292 and 3294, and Title 18, United States Code, Section 371.

After a trial lasting five court days, the jury on November 15, 1955, returned a verdict of guilty on each of the two counts of Information No. C 145-283, and on the one

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After a trial lasting five court days, the jury on November 15, 1955, returned a verdict of guilty on each of the two counts of Information No. C 145-283, and on the one

count of Information No. C 147-278. Appellant was fined $3,000 and sentenced to 60 days imprisonment on Count I of C 145-283, and was placed on probation for four years on Count II of that Information, probation to begin after service of sentence on Count I. On Information No. C 147-278 imposition of sentence was suspended, and a four year probation period was imposed to run concurrently with the first four year period. Defendant was released in $1,500 bail pending this appeal. Two co-defendants, Samuel Aaron and Ernest Broussard, pleaded guilty to Information C 145-283 before trial and are not appealing here.

Prior to trial motions were made as follows:

(a) Motion to suppress and return evidence seized at appellant's butcher shop pursuant to a search warrant (Noonan, J.).

(b) Motion for a bill of particulars (Leibell, J.).

(c) Motion for dismissal of the conspiracy information, C 147-278 (Walsh, J.).

All of the pre-trial motions were denied except that Judge Noonan deferred to the trial judge the question of what documents seized at the butcher shop should be held inadmissible as having no relation to the crime charged. At the conclusion of a memorandum opinion, filed December 23, 1954, Judge Noonan stated:

> "It is my considered opinion that no useful purpose would be served by having a hearing at this time on the issue as to which papers do or do not relate to the lottery business, or which papers do or do not relate to the butcher business.
>
> The rights of the defendant will be preserved because at the trial only such of the seized items as are rel-

evant and material to the criminal charges would be received in evidence by the trial court.

The motion is, accordingly, denied. So ordered."

Statutes Involved

Title 18, United States Code,

"§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

"§ 3651. Suspension of sentence and probation.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is

punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years."

Title 26, United States Code.

"§ 2707. Penalties.

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

"§ 3277. Liability of partners.

Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax.

"§ 3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

"§ 3291. Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—.

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

"§ 3292. Certain provisions made applicable.

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply."

"§ 3294. Penalties.

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

. . . . .

(c) Wilful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. (Added Oct. 20, 1951, 2:07 p.m., E. S. T., ch. 521, title IV, § 471(a), 65 Stat. 529.)"

Statement of Facts

During the period of the offenses charged, appellant was the proprietor of a butcher shop located at 363 Lenox Avenue, New York City (6).* This butcher shop was being used as the situs of a large scale policy operation. From July 28 to August 5, 1953, Federal agents made five visits to the butcher shop and placed bets with co-defendants Aaron and Broussard who were employees of appellant. During each of these visits the agents saw people lined up in front of the counter placing bets (Applt.'s App. 7-10, 13-15), and on one occasion when an agent asked Aaron what number had won the day before Aaron pointed to three numerals which were posted on the front of the scales (Applt.'s App. 9).

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* Parenthetical page references are to Government's printed appendix, except where otherwise indicated.

Prior to their visit on August 5, 1953 both agents prepared carbon copies of policy slips, and upon entering the butcher shop they made bets with the originals and kept the carbon copies for evidence (Applt.'s App. 10, 14; Exs. 1, 1-A, 2 and 2-A).

Based on affidavits of the agents who had placed these bets, a search warrant was obtained on August 5, 1953 and executed the same day by Federal officers.

Upon entering the store the officers found appellant, the owner, in a room in the rear. After identifying themselves, the officers questioned the occupants of the store and conducted a search pursuant to the warrant. Initially, appellant denied that he was the owner, and stated that he was merely visiting the store (2, 8).

In the rear room of the store the officers found "several thousand money wrappers" and "several hundred pads of paper". (5). Appellant was then searched, and was found to have $1,366 in cash on his person (2, 8 and Applt.'s App. 26).

Appellant was next escorted to the front of the store and asked to open a safe on the premises. Appellant first denied knowing the combination of the safe, but thereafter he personally opened it (2, 7, 9).

A search of the safe disclosed envelopes containing policy slips (Exs. 3, 4 and 6), as well as between ten and eleven thousand dollars in cash (8, 9 and Applt.'s App. 15).

Having found some evidence of gambling, the officers demanded from appellant all other policy slips on the premises. At this point appellant turned to his employee,

Broussard, and pointing at the scales where winning numbers had been posted, said "Ernie, give him the policy slips in the bottom of the scale" or "give them the slips" (Applt.'s App. 17, 26, 35 and Ex. 5).

Broussard then turned over some 150 policy slips containing thousands of plays which were hidden in the scales. Among these slips were the two bets placed by the agents earlier the same day which matched the carbon copies retained by the agents as evidence (5 and Exs. 1, 1-A, 2 and 2-A).

The contents of the safe were seized under the search warrant, and, pursuant to Judge Noonan's pre-trial order (Govt.'s Brief, pp. 2, 3), only those exhibits relevant to the crime charged were admitted in evidence at trial (3).

Appellant admitted at trial by stipulation that he had not registered or paid a tax (32).

POINT I

The evidence against appellant was overwhelming and clearly supports the jury's verdict.

A reading of the statement of facts in this brief, as supported by the record, affirmatively shows the degree of appellant's complicity in the crimes charged. The following are the highlights of the evidence.

(a) Appellant Owned the Store and Was Present on the Premises

There can be no question that appellant's store was being used in a policy operation. Federal agents per-

sonally made many bets with appellant's employees, and both co-defendants, Aaron and Broussard, admitted taking bets and pleaded guilty before trial. At the time the search was made appellant was on the premises and directed an employee to turn over policy slips to the Federal officers (Applt.'s App. 17, 26, 35 and Ex. 5).

(b) Tangible Evidence of Gambling Was Found in Appellant's Store

In searching appellant's store pursuant to a warrant, Federal officers found policy slips and cash in excess of $10,000 in appellant's safe (7-9 and Applt.'s App. 15). They further found policy slips in the scales of which appellant had personal knowledge (Applt.'s App. 17, 26, 35 and Ex. 5). Thousands of money wrappers and pads were found in a rear room of the store (5).

Appellant personally opened the safe and admitted owning the cash found therein (4). Winning numbers from the previous day were openly posted on the front of the scales (Applt.'s App. 9).

(c) Appellant Lied to the Federal Officers and Was Evasive at the Time of the Search

The jury might also consider appellant's attitude at the time his store was searched, in determining his state of mind and knowledge of guilt.

Although appellant was the owner of the store, he told the Federal officers that he was merely visiting (2, 8). When asked to open his safe, he stated that he did not know the combination, but thereafter changed his mind (2, 7, 9).

If appellant had been innocent of any knowledge of gambling on the premises, he would have no motive to lie to the Federal officers to the extent that he did.

(d) Appellant's Financial Condition Was Unusual For a Butcher

The evidence showed that appellant was involved in rather high finance for the proprietor of a small butcher shop.

The Government's direct case showed that appellant had more than $1,300 in cash on his person (2, 8 and Applt.'s App. 26), and that he had more than $10,000 in cash in a locked safe (8, 9 and Applt.'s App. 15).

On cross-examination by defense counsel it was further brought out that appellant drove a Cadillac Coupe de Ville (6), and that the Federal Government had assessed taxes of approximately three-quarters of a million dollars against him (Applt.'s App. 22).

This type of financial status is more in keeping with the position of one with a higher income than a retail butcher, and might also properly have been considered by the jury in deciding whether appellant was a large scale policy operator.

The evidence against the appellant at the time his store was searched was testified to by three Federal officers who executed the warrant, and was substantially consistent under severe cross-examination.

This evidence was clearly sufficient to support the jury's verdict in this case. See *Brad* v. *United States*,

41 F. 2d 449 (7th Cir. 1930) and *Winkelstein v. United States*, 60 F. 2d 959 (3rd Cir. 1932).

The sole issue now presented is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict". *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 234 (1940). The evidence should be viewed in the light most favorable to the Government. *United States v. Manton*, 107 F. 2d 834, 839 (2d Cir. 1939), *cert. denied*, 309 U. S. 664 (1940).

Clearly the mass of evidence set forth in the statement of facts above was more than sufficient to meet this test.

POINT II

The testimony concerning appellant's prior arrest came as a responsive answer to a question by defense counsel on cross-examination.

On cross-examination of one of the Federal officers who had participated in the search of the store and the arrest of appellant, defense counsel asked the following questions (Applt.'s App. 35-6):

> "Q. Did you then have a conversation with the defendant? A. Yes. I . . .
>
> Q. In the rear? A. In the rear of the store. I got a piece of paper . . .
>
> Q. *What did you say to him and what did he say to you?*" (emphasis added)

The witness then responded:

> "A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx ad-

dress. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before."

At this point defense counsel attempted to break in and stop the responsive answer, but the Court remarked:

"The Court: You asked him what the conversation was. I didn't know that he had finished."

Whereupon, after brief colloquy, the witness responded:

"When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago."

Defense counsel then moved for a mistrial which was denied, and now claims on appeal that the denial of his motion warrants reversal.

(a) Appellant Cannot Fish for Favorable Testimony on Cross-Examination and Then Claim Error If Some of the Testimony Is Unfavorable

Defense counsel asked a question and got a responsive answer. To say that the answer was an unfair surprise is to disregard the natural probabilities of the case. This witness had searched appellant's store and participated in his arrest. He had questioned appellant on the same day at his store.

It would seem inevitable that a Federal officer who had questioned a potential defendant would have asked him if he had ever been arrested before.

When defense counsel asked: "What did you say to him and what did he say to you?", the witness had no choice but to relate the entire conversation.

In *Felton* v. *United States*, 170 F. 2d 153 (C. A. D. C. 1948), *cert denied*, 335 U. S. 831 (1948), the appellant complained that testimony had been admitted on cross-examination which connected him with another crime. The Court of Appeals at p. 155 stated:

> "Suffice it to say that this testimony was elicited by appellant's own counsel on cross-examination. Counsel apparently asked a few too many questions. That is a fault most of us who have tried cases in court have occasionally committed, but for such wounds there is no balm to be applied by a Court of Appeals."

(b) In the Light of the Overwhelming Evidence Against Appellant, the Careful Instruction of the Trial Court and the Remoteness of the Prior Arrest, Appellant Was Not Prejudiced

After the testimony about appellant's fifteen-year-old arrest was elicited by defense counsel, the trial court heard argument on a motion for a mistrial, and, at the beginning of the next court session, instructed the jury as follows:

> "However, at the close of the last session there was a witness on the stand who was asked a question by counsel for the defense and in answering the question said something about the previous arrest of this defendant.
>
> That ought not to have been brought out. Counsel in asking the question did not expect that it would be brought out, did not try to bring it out, and it was only on my insistence, and I wrongly insisted on it, that he told the whole story that was brought out."

Now, the reason that the law does not permit testimony with respect to previous arrests is that an arrest means absolutely nothing, just as I told you at the beginning of the case, a man is presumed to be innocent until he is found guilty, and the arrest is nothing more than the information that I was talking to you about, so that it has no bearing on the question in the eyes of the law. And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out." (Applt.'s App. 49).

At the conclusion of the case, the Court further charged:

"Any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant." (11).

In the light of the mass of evidence against the appellant set forth in Point I of the Government's Brief, and the remoteness in time of an arrest that took place fifteen years before the instant crime, the trial Court's careful instruction to the jury clearly obviated any prejudice to appellant. *United States* v. *Tramaglino*, 197 F. 2d 928 (2d Cir. 1952), *cert. denied*, 344 U. S. 864 (1952).

POINT III

Appellant was properly charged and convicted of substantive crimes and conspiracy to commit those substantive crimes.

Title 18, United States Code, § 3290 imposes an occupational tax on persons engaged in the business of accepting wagers. § 3291 requires such persons to register with the Collector of Internal Revenue (Govt.'s Brief, p. 5).

Engaging in the business of accepting wagers without registering and paying the occupational tax is punishable under the penalty provisions of § 3294 (Govt.'s Brief, p. 6).

Wilful violations as were charged in this case, are punishable under § 2707 by direct reference from § 3294(c) (Govt.'s Brief, pp. 4, 6).

Although appellant was specifically charged and convicted under § 2707(b), he contends that there can be no conspiracy to commit offenses under § 2707(b) which defines a misdemeanor, but that the charge should have been under § 2707(c) which is a felony. Appellant then argues that since § 2707(c) is a felony section, the case was improperly brought on by informations.

(a) Title 18, United States Code, § 2707(c) Has No Application to This Case and Appellant Was Properly Tried and Convicted Under § 2707(b)

Contreras v. United States, 213 F. 2d 96 (5th Cir. 1954), cited at p. 19 of appellant's brief, specifically holds that

§ 2707(b) is the applicable statute in this type of wagering tax case.

In construing § 2707, Judge Rives stated at pp. 97-8:

> "Subsection (a) of Section 2707 relates to a penalty to be assessed and collected in the same manner as taxes, and intends a mere civil sanction. *Paddock* v. *Siemoneit*, 147 Tex. 571, 218 S. W. 2d 428; 7 A. L. R. 2d 1062. Subsection (a) is therefore not pertinent here. Subsection (c) refers to 'Any person required * * *' to collect, account for and pay over any tax * * *.' There was no charge that the defendant was required to 'collect' or 'account for' the tax. Subsection (c) covers also 'any person who willfully attempts in any manner to evade or defeat any tax * * *', but the defendant was not so charged. Subsection (b) refers to 'Any person required * * * to pay any tax,' and that subsection (b) is the only one that could apply to the offense charged against the defendant, viz: that he 'did willfully and unlawfully fail to register and pay the special tax * * *.'"

The charge in this case was that appellant did "unlawfully, wilfully and knowingly fail to pay the special tax", and did "unlawfully, wilfully and knowingly fail to register" (Applt.'s App. pp. 2-3).

A mere reading of §§ 2707(b) and 2707(c) shows that the former is the only one that could be applicable to this case.

(b) Appellant Was Properly Charged and Convicted of Conspiracy to Violate the Wagering Tax Laws

Appellant argues at page 20 of his brief that § 2707(b), which proscribes wilful failure to register and pay taxes, contemplates mere passivity on the part of the violator, and that since conspiracy implies affirmative action, there can be no conspiracy to violate § 2707(b).

In so arguing appellant quotes at length from the opinion in *Spies* v. *United States*, 317 U. S. 492 (1943). The *Spies* case, however, dealt with the different degrees of proof of wilfullness required under Title 26, United States Code, §§ 145(a) and 145(b). Nowhere does that case hold that there cannot in law be a conspiracy to commit either offense.

It has long been settled that in a conspiracy case the crime is the *agreement* to commit the offense. *Goldman* v. *United States*, 245 U. S. 474 (1918); *United States* v. *Rabinowich*, 238 U. S. 78 (1915).

That there can be a conspiracy to commit an offense of omission is made clear by certain selective service cases where defendants were indicted for conspiring to fail to report for induction.

In *United States* v. *Offutt*, 127 F. 2d 336 (C. A. D. C. 1942) defendants attacked an indictment charging two persons with conspiring to cause one defendant to fail to report for induction. Defendants argued that such a conspiracy was a "legal impossibility".

In upholding the validity of the indictment, the Court of Appeals at p. 339 stated:

> "We hold point (2) unsound. The argument is a clever combination of the fact that an overt act is required, of the fact that only two conspirators are named, and of the fact that the object of the conspiracy was an offense of omission. Suppose we take the present statute. A is the one required to register. A and B agree that A will not register. B locks A in X's time vault which is not expected to open until after the registration period. It would appear that A and B agreed or conspired to commit an offense against the United States, the offense being the failure of A to register. The act of locking A in X's time vault is certainly an overt act, and it certainly was intended to effectuate the conspirators' purpose of having A not register. The essentials of the statutory crime of conspiracy are all present."

In the case at bar all of the elements of conspiracy were charged and proven and appellant properly stands convicted.

POINT IV

The sentence was not illegal.

Appellant contends that the District Court cannot legally impose probation in excess of the term of the maximum sentence provided by law.

Appellant's contention is squarely negatived by the express provisions of the statute and the case law. The

statute, Title 18, United States Code, § 3561, provides as follows:

> "*Suspension of sentence and probation.*
>
> * * * * * *
>
> The period of probation, together with any extension thereof, shall not exceed five years."
>
> * * * * * *

This applies to misdemeanors as well as felonies. In *Hollandsworth* v. *United States*, 34 F. 2d 423 (4th Cir. 1929), the Court said at pp. 426-7:

> "But there is no express provision of the Probation Act that the term of probation must not exceed the maximum period for which a sentence of imprisonment may be imposed. Congress expressly provided, in section 1 of the act (18 USCA § 724) that the period of probation, together with any extension thereof, should not exceed five years. Herein is no suggestion that the period of probation is limited by the period of maximum sentence."
>
> * * * * * *
>
> "It is clear that these terms of the statute extend rather than restrict the powers of the District Court. They do not justify the conclusion that the maximum five-year period of probation allowed by section 1 of the act is to be read as if subject to the provision that the term of probation shall in no case exceed the term of maximum sentence. There is indeed no necessary connection between the term of probation and the term of imprisonment."

See also *Mitchem* v. *United States*, 193 F. 2d 55 (5th Cir. 1951).

CONCLUSION

For the foregoing reasons the Government respectfully requests that the conviction in this case be affirmed.

Dated: New York, N. Y.
May 31, 1956.

Respectfully submitted,

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Attorney for the United States of America.

GEORGE S. LEISURE, JR.,
Assistant United States Attorney,
Of Counsel.

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(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 145-283

C. 147-278

UNITED STATES OF AMERICA

vs.

SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD.

Before—HON. EDWARD J. DIMOCK, *D. J.*,
and a Jury.

New York, November 9, 1955;
3. o'clock p.m.

APPEARANCES:

PAUL W. WILLIAMS, Esq., United States Attorney, for the Government. By George S. Leisure, Jr., Esq., Assistant United States Attorney.

BENJAMIN LEVY, Esq., Attorney for Defendants Samuel Aaron and Ernest Broussard.

ARNOLD D. ROSEMAN, Esq., Attorney for Defendant Salvatore Apuzzo.

(36)

JAMES J. GUTHRIE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Leisure:

(38)

Q. What was his response to the questions in regard to what he was doing there? A. Mr. Apuzzo at the time of the initial questions stated he was just visiting there.

Q. You say he was searched on that occasion? A. He was.

Q. In your presence? A. He was.

Q. And was money found on his person? A. Yes, sir, money was found on his person in the amount of approximately $1300.

(39) And was that counted in your presence? A. That was counted in my presence.

Q. Now, was there a conversation between Mr. Lemler and Mr. Apuzzo after the search? A. There was.

Q. Will you tell us the nature of that? A. Well, after the search we proceeded, Mr. Lemler, Mr. Gianatasio and myself, to the front part of the store.

We asked Mr. Apuzzo to open the safe that was under the counter. He initially denied knowing the combination of the safe.

I heard Mr. Lemler ask—tell him that if the safe was not opened we would have to get a truck and bring it down to our own office where it would be opened forcibly.

At that point Mr. Apuzzo proceeded to the safe and opened it in our presence.

The safe was under the counter in the butcher shop proper.

Q. Now, were the contents of the safe searched in your presence? A. Yes, sir.

Q. And did you participate in that search? A. The contents of the safe were removed in (40) the presence of Mr. Lemler and Mr. Gianatasio and Mr. Apuzzo, and the other employees of the store.

Q. Was there cash in the safe?

Mr. Roseman: I am going to object to that, your Honor. I think it is now the propitious time for me to argue that motion.

The Court: Very good. The jury will be excused for a short time.

* * * *

(62) * * *

The Court: I have grave doubt as to the admissibility of the bankbook and the insurance policies as against the claim of illegal search and seizure.

Mr. Leisure: In that case, your Honor, I will respectfully withdraw the offer of the last exhibits and consent to strike Exhibits 7 and 8 which are now in evidence, the two bankbooks, and I think that would simplify it.

The Court: All right. I will accept that. Then Exhibits 7, 8 and 9 will be treated merely as exhibits for identification.

Mr. Leisure: I think that disposes of it, your Honor.

(Government's Exhibits 7, 8 and 9 for identification received in evidence, now only marked for identification.)

The Court: The Court will take a short recess.

(Short recess.)

(63) (The following proceedings took place in the presence of the jury:)

Mr. Leisure: May I proceed, your Honor?

The Court: If you please.

Direct examination continued by Mr. Leisure:

Q. Mr. Guthrie, you testified before the recess that you found between ten and eleven thousand dollars in the safe.

Did you have any conversation with Mr. Apuzzo with respect to that matter? A. At the time the money was being counted; that is, the money found in the——

Mr. Roseman: I can't hear the witness, your Honor.

The Court: Please speak a little louder.

The Witness: At the time the money was being counted in the presence of Mr. Apuzzo on one of the paper boxes at the rear of the front part of the store there was some conversation to the effect that, "Are you going to take the money?"

We indicated we would.

He said, "It belongs to me."

And, of course, we did take it anyway.

(65)

Q. I show you Government's Exhibit 5 for identification, and ask you if that is the brown envelope and the con-

tents that you have just testified about? A. That is right. There were two additional slips in this group, however, that were removed at the time.

Q. I show you Government's Exhibits 1 and 2 in evidence and ask you if those two slips were found among those slips that were in the scale? A. They were.

* * * * *

(69) Cross examination by Mr. Roseman:

* * * *

(81) * * *

Q. Was there a bathroom there, a lavatory? A. I don't recall a bathroom or lavatory. Do you want me to describe it, sir?

Q. Yes, if you will, please. A. To the best of my recollection as we entered the back room on the right hand side, there was what I would say was a makeshift table, upon which you had an adding machine, and also upon which there were several thousand money wrappers of denominations anywhere from $50 down to one cent.

There were several hundreds more pads of paper, several boxes of small envelopes which you would describe as pay envelopes.

* * * *

(90) * * *

Q. And Mr. Apuzzo told you he was the owner of this shop? A. He did not.

Q. When did you learn that he was for the first time? A. For the first time?

Q. In time. A. In time there was an admission of ownership.

Q. I said when did you first learn that Mr. Apuzzo owned this shop in time? A. When he made the admission thereto.

Q. And when was that? A. That was later that day at 143 Liberty Street.

Q. But not before that? A. Not before that, except, of course for the indicia of ownership that we found at the shop.

* * * *

(123)

Q. Will you tell the jury when you spoke with him again? A. I spoke to Mr. Apuzzo sometime later that summer in the process of seizing a Cadillac de Ville in the execution of a lien——

Q. Did you seize this car? A. I did not. A collection officer——

Q. Were you there? A. I was present.

Q. Did you turn his car over to another agent? A. I did not.

Q. On what day was that, if you please? A. I don't recall the date. It was sometime later that summer.

Q. Was it in the summer of 1953 or the summer of 1954? A. I am quite certain it was the summer of 1953.

* * * *

(138) * * *

MARTIN D. LEMLER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Leisure:

* * * * *

(141) * * *

Q. What did you do when you got out into the outer room? A. Mr. Apuzzo and the other investigators and myself then went to the front of the store, where I noted a safe, a small safe, underneath the counter, one of the meat counters.

I tried the door of the safe. It was locked. I asked Mr. Apuzzo to open it and he said he didn't think he could; he didn't know how to open it.

Mr. Rosenman: I can't hear that.

(142) (Answer read.)

The Court: Will you speak up a little louder.

A. I then advised Mr. Apuzzo that the warrant had directed us to remove the contents of any safe found on the premises and that in the event the safe wasn't opened, we would be forced to take it to a Government warehouse.

Q. What happened then? A. Mr. Apuzzo opened the safe.

Q. Did you search the contents of the safe? A. Yes, I did.

Q. I show you Government's Exhibits 3, 4 and 6 in evidence and ask you if those three documents were found in the safe on that occasion? A. Yes.

Martin D. Lender—for Government—Direct

Q. Was there some money found in the safe, too? A. Pardon?

Q. Was there some money found in the safe? A. Over $10,000, I believe.

Q. In cash? A. In cash.

* * * *

(188) * * *

VINCENT J. GIANATASIO, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Leisure:

* * * *

(190) * * *

Q. Were you present when Mr. Apuzzo was searched? A. Yes, I was.

Q. Was any money found on his person? A. There was $1366.

Q. It was counted in your presence? A. Yes, and Mr. Apuzzo's presence.

Q. Were you present when any conversation was had with the defendant Apuzzo in the back room? A. Yes.

(191) Q. What was the nature of that conversation? A. Well, we asked Mr. Apuzzo his name and his address and asked him what he was doing there. He told us that his name was Apuzzo and he gave me a Bronx address and he said he was visiting in the rear.

Q. Did you have a further conversation with respect to his safe? A. Yes. We took Mr. Apuzzo from the rear room to the butcher shop part of the store, and Special

Investigator Lemler said, "Who's got the combination to the safe?"

Broussard, who was behind the counter, said, "I don't have the combination."

Mr. Apuzzo said, "I don't have the combination."

And there was another man behind the counter by the name of Henry something—I don't just recall offhand. He said he didn't have the combination. So I heard Special Investigator Lemler say to Mr. Apuzzo, "All right, I'll have to call up a truck and take the safe to the office and open it there."

Mr. Apuzzo then went behind the counter and opened the safe.

Q. Were you present when the contents of the (192) safe were searched? A. Yes, I was.

Q. I show you Government's Exhibits 3, 4 and 6 in evidence and ask you whether these were found in the safe (handing to witness)? A. Yes, this is one slip found in the safe. There are my initials on it. This envelope was also found in the safe. My initials are on it.

Q. Referring to Exhibit 4 in evidence: A. And this other envelope, Exhibit No. 3, this was found in the safe, and I initialed that and dated it.

(366) CHARGE OF THE COURT

The Court: (Dimock J.) Ladies and gentlemen of the jury, it is my duty as judge to instruct you as to the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you.

On the other hand, it is your exclusive province to

determine the facts in this case and to consider the evidence for that purpose. You are the sole judges of the weight, the effect, and value of the evidence and the credibility of the witnesses. Just as you are not permitted to encroach upon the Court's functions in giving instructions on the law, so I must be careful not to encroach on your function as the sole judges of the facts.

The defendant, Salvatore Apuzzo, is on trial under two informations which have been tried together at one time. One of these informations that I will deal with first is one which charges a conspiracy to violate the United States Code, specifically Title 26, Sections 2707(b), 3277, 3290, 3291(a), 3292, and 3294.

That, you will note, is an information (367) charging conspiracy.

The information that I will deal with secondly charges the same defendant with the crime of violating the same sections of the United States Code. That is framed in two counts.

Count 1 charges the violation of the same sections that I enumerated to you before, and they deal with failure to pay the special tax involved.

The second count of this substantive information charges violation of the same sections again except that 3291(a) is substituted for 3292, and that deals with the failure to register.

Now, in the second information composed of these two counts there is no charge of conspiracy. The second information is, as I have called it, a substantive charge. It is for the direct violation of a criminal statute of the United States. So in discussing the two informations I will refer to one as containing the conspiracy charge and the other as containing the substantive charge so that we can

keep those two informations separate in discussing and considering them.

The verdict that you reach in this case must be based solely on the evidence and in accordance with (368) these instructions.

The informations that I have just referred to are nothing but written accusations. They are charges and not in themselves any evidence of the guilt of the defendant.

The fact that the defendant is the subject of an information and on trial should not be taken against him. He is presumed to be innocent, and this presumption has the weight and the effect of evidence on behalf of the defendant. It continues in his favor throughout the entire trial and even during your deliberations in the juryroom, and is overcome only if and when guilt is established beyond a reasonable doubt.

Any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant.

The defendant does not have to prove his innocence. The burden of proof is upon the government to establish the guilt of the defendant beyond a reasonable doubt. That burden never shifts and is not met unless and until the proof offered by the Government, and all the evidence in the case convinces you beyond a reasonable doubt of the defendant's (369) guilt.

Having stated that the burden rests upon the Government to prove the guilt of the defendant beyond a reasonable doubt, the next question that naturally arises is, What is a reasonable doubt?

Courts, judges, and students of the law have defined it in various ways, and actually all of them add up to the same thing: that the words almost define themselves;

that it is a doubt founded on reason and arising from the evidence. Reasonable doubt means a doubt which a reasonable person has after carefully weighing all the evidence. It is a doubt which is substantial and not merely a shadow. It does not mean a doubt which is either capricious or speculative. Neither does it mean a doubt born of a reluctance on the part of a juror to perform an unpleasant duty or a doubt arising out of sympathy for the defendant, or out of anything other than a candid consideration of all the evidence.

If after a fair and impartial consideration of all the evidence, you candidly and honestly say that you are not satisfied with the guilt of the defendant, or that you do not have an abiding conviction of his guilt which amounts, to a moral certainty of such (370) guilt, then you have a reasonable doubt and you should find the defendant not guilty. But, however, if after such an impartial consideration of all the evidence, you candidly and honestly say that you have an abiding conviction of the guilt of the defendant which amounts to a moral certainty, such a conviction which you would be willing to act on in the more weighty and important matters of your own affairs in life, then you have no reasonable doubt and you should find the defendant guilty of the charge made against him.

With the foregoing general instructions as to the law, let us turn to the issues and the facts in this case.

The first information, the conspiracy information, reads this way:

"The United States Attorney charges:

"1. From on or about the 28th day of July, 1953, up to and including the 5th day of August, 1953, in the Southern District of New York, the defendants, Samuel Aaron, Salvatore Apuzzo and Ernest Broussard, and others to the United States

Attorney unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to (371) violate the United States Code;"

citing that long string of numbers that I gave you before.

"2. It was a part of the conspiracy that the said defendants unlawfully, wilfully and knowingly would engage in the business of accepting wagers in the County of New York, New York, individually and as a co-partnership, and fail to pay the special tax imposed by law to the Director of Internal Revenue for the Upper Manhattan District, at New York, New York.

"3. It was a further part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would engage in the business of accepting wagers, in the County of New York, New York, individually and as a co-partnership, and would fail to register with the Director of Internal Revenue for the Upper Manhattan District of New York, at New York, New York, as required by law, in violation of Title 26, United States Code,"

citing those sections of the United States Code which are alleged to have been violated.

(372) Then the information goes on with three paragraphs headed "Overt Acts" and the wording of these paragraphs is:

"1. In pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1953, in the Southern District of New

York, the defendant Samuel Aaron accepted a wager from Edward E. Goodwin.

"2. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1953, in the Southern District of New York, the defendant Ernest Broussard accepted a wager from Columbus Fletcher.

"3. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 5th day of August, 1953, in the Southern District of New York, the defendant Samuel Aaron accepted a wager from Columbus Fletcher,"

citing Title 18, United States Code, Section 371.

Now, you have noticed that that information charges a conspiracy to violate the laws of the United States in two respects:

(1) With respect to engaging in the business (373) of accepting wagers without paying the special tax imposed by law; and

(2) With respect to engaging in the business of accepting wagers without registering with the Director of Internal Revenue as required by law.

It is because of these two particular charges, involving engaging in the business of accepting wagers without paying the tax and without registering that the case comes before a Federal Court rather than one of the State Courts.

Now, you have noticed that the indictment charges a conspiracy to violate the laws of the United States in two respects. In addition to the charge of conspiracy to vio-

late the laws of the United States in these two respects you will notice that there are three overt acts charged. That is a particular requirement in the case of a conspiracy information, and that I will refer to further when I am instructing you with respect to the crime of conspiracy.

In order that you may have before you the laws which I refer to—and I don't think they are much longer than the numbers that I read, but I will read to you the pertinent parts.

First we will take the United States Code (374) with respect to the imposition of the tax; section 3290 of Title 26 of the United States Code, which contains this general requirement:

> "A special tax of $50 per year shall be paid by each person who is . . . engaged in receiving wagers . . ."

Now here I charge you that this tax is imposed upon any person who receives wagers, whether or not this is the only activity in which he engages. In fact, the person does not have to be primarily engaged in this activity.

Then Section 3285 defines wagers to include

> "any wager placed in a lottery conducted for profit."

And the term "lottery" is defined in the same section to include

> "the numbers game, policy, and similar types of wagering."

Section 3291 deals with the requirement of registration, and the pertinent parts read as follows:

> "Each person required to pay a special tax under

this sub-chapter shall register with the Collector of the district:

"(1) His name and place of residence;

(375) "(2) If he is liable for tax . . ., each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf . . ."

And Section 2707 deals with the effect of failing to comply with the statutes I have just quoted and that section reads:

"Any person required under this sub-chapter to pay any tax, or required by law or regulations made under authority thereof to . . . supply any information, for the purposes of the computation, assessment or collection of any tax imposed by this sub-chapter who wilfully fails to pay such tax, . . . or supply such information at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor."

That covers the two offenses which the defendant is charged with conspiring to commit in the conspiracy information.

The second information, the substantive one, refers to the actual failure of this defendant, while engaging in the business of accepting wagers, to pay the special tax and to register. That information (376) reads, beginning the same way as the other:

"The United States Attorney charges:

"On or about the 5th day of August, 1953, the de-

fendants Samuel Aaron, Salvatore Apuzzo and Ernest Broussard who engaged in the business of accepting wagers in the County of New York, New York, individually and as a copartnership during the month of August, 1953, did unlawfully, wilfully and knowingly fail to pay the special tax imposed by law to the Director of Internal Revenue for the Upper Manhattan District of New York, New York,"

citing these sections of the law.

"Second Count

"The United States Attorney further charges:

"On or about the 5th day of August, 1953, in the Southern District of New York, the defendants Samuel Aaron, Salvatore Apuzzo and Ernest Broussard who engaged in the business of accepting wagers in the County of New York, individually and as a copartnership during the month of August, 1953, and who were required to pay the special tax imposed by law, did unlawfully, wilfully and knowingly fail to register with the (377) Director of Internal Revenue for the Upper Manhattan District of New York at New York, New York, as required by law,"

and so on.

I have already read to you the pertinent parts of these sections of the United States Code, which involve the payment of the special tax and registration by one who is engaged in the business of accepting wagers. In other words, the Government is charging in the conspiracy in-

formation that the defendants conspired with others to violate several laws of the United States. The conspiracy count does not charge, and the Government is not required to prove as to that conspiracy count itself, that the defendant actually violated any of the laws I read to you.

Putting it another way, the defendant is not charged in the conspiracy information with failing to pay the special tax and failing to register while engaged in the business of accepting wagers. He is charged with conspiracy to do those things.

The information is based on the conspiracy provisions of the statute, Section 371 of Title 18 of the United States Code, which makes it an offense if two or more persons conspire to commit any offense against (378) the United States, and one or more of such persons do any act to effect the object of the conspiracy.

That is the overt act that I told you about.

The Government, to substantiate the conspiracy information, is required to prove the conspiracy charge, the essential elements of which are (1) the existence of the conspiracy and (2) the commission of at least one of the overt acts charged in the information. And before you may convict, you must find each essential element beyond a reasonable doubt. If you do not, then your verdict must be not guilty on the conspiracy information.

A conspiracy is a combination or an agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. It is a partnership in criminal purposes. The gist of the offense is the unlawful combination or agreement to violate the law. However, it is not necessary that two or

more persons should meet together and enter into a formal or explicit agreement either in writing or by oral words, stating the formation of the conspiracy, or the details of the plan, or the means by which the unlawful scheme is to be carried (379) out. Indeed, it would be unusual if there was such a formal agreement. When men in fact enter into a plan of that character, much is left to unexpressed understanding. It is sufficient if you find beyond a reasonable doubt that the minds of the parties met in an understanding way so as to bring about a deliberate agreement to do the act or acts charged.

The agreement generally is a matter of inference deduced from the acts of the persons accused done in pursuance of the apparent criminal purpose. The crime is completed when an overt act to effect the object of the conspiracy is done by at least one of the conspirators. The overt act need be neither criminal nor the very crime that is the object of the conspiracy. It must, however, accompany or follow the agreement and must be done in furtherance of the object of the agreement.

Thus, in this case there are three overt acts charged. The overt act essential to a conspiracy prosecution need not implicate all of the parties to the conspiracy. If you find that any one of the overt acts alleged did in fact occur and (380) that the act was committed in furtherance of the purpose of the conspiracy, then the second element of the conspiracy count has been proved.

Incidentally, I must charge you that you must find, if you are to convict the defendant, that one of these overt acts was performed in the Southern District of New York, so as to give this Court and this jury jurisdiction.

If you fail to find beyond a reasonable doubt that there

was a conspiracy, or that this defendant was a member of it, or if you fail to find beyond a reasonable doubt the commission of one or more of the overt acts, or that it or they were in furtherance of the conspiracy, then you should acquit on the conspiracy information.

Of course, if in the first instance you find there was no conspiracy, then you do not consider at all the issue of overt acts.

Now, as to the substantive count, that is much simpler. But there you do have that same element of the possible responsibility of a man who does not actually with his own hands do the acts which are charged as a crime.

In so far as the substantive offense is (381) concerned, in order to convict the defendant of failure to pay the special tax and register while engaged in the business of accepting wagers, it is necessary that you be satisfied beyond a reasonable doubt that the defendant was actually engaged in the business of accepting wagers on or about the date alleged in the information, and that the defendant failed to pay the special tax and register.

However, what I have said does not mean that in order to convict the defendant you must find that he personally accepted the wagers, or that he was present when the wagers were accepted. It is enough if others took bets at his direction, or on his behalf, or with his consent. That is based on that statute which we have in Section 2 of Title 18 of the United States Code headed "Principals", which says:

> "Whoever commits an offense against the United States or aids, abets, counsels, induces or procures its commission is a principal; and
>
> "Whoever causes an act to be done which, if directly performed by him, would be an offense

against the United States is also a principal and punishable as such."

Thus, every person concerned in the commission (382) of a crime who either directly or actively commits the act constituting the offense or knowingly and wilfully aids and abets in its commission, or, whether present or not, advises and encourages its commission, is regarded by the law as a principal in the crime thus committed and is equally guilty thereof.

To abet another in the commission of a crime implies consciousness of guilt in instigating, encouraging, promoting or aiding in the commission of such criminal offense. In short, in order to aid and abet another to commit a crime, it is necessary that the defendant in some way associate himself with the venture, that he participate in it as something he wishes to bring about, and that he seek by his action to make it succeed. It is not enough that he simply know that a crime has been committed, or that he did nothing to prevent it.

I must charge you that before you may find the defendant guilty of the substantive crime you must find that the crime as charged was committed in the Southern District of New York.

One further point on the information. You will note that both informations charge the defendant (383) with wilfully and knowingly violating the United States statutes. Therefore, it is not sufficient to convict this defendant of this charge for you to find only that the defendant did not register and did not pay the special tax. Furthermore, it is not sufficient to convict the defendant of this charge if you find also that the defendant was engaged in the business of accepting wagers and, there-

fore, should have registered and should have paid the tax.

You must find, in order to convict the defendant of the wilful violation charge, that he failed to register and failed to pay the tax while engaged in the business of accepting wagers and that he did so wilfully and knowingly.

If the defendant failed to register and failed to pay the tax because of ignorance of his liability for the tax, he did not do so wilfully.

In determining the question whether the defendant was ignorant of the requirement of registration and payment of the tax you may consider the testimony as to his attitude at the time of the raid. Attempts to hide, suppress, or secrete evidence may be considered as evidence of guilty knowledge of consciousness of guilt.

(384) If you find that the defendant did not wilfully fail to pay the tax, you may still find him guilty in the substantive information only of the lesser offense of merely failure to pay the special tax while engaged in the business of accepting wagers. The question of the defendant's ignorance of the requirement of registration and payment of the tax should not enter into your decision of this lesser offense.

To find the defendant guilty of this lesser offense, you need find only that the defendant failed to pay the special tax and was engaged in the business of accepting wagers. There is no such lesser offense in the statutes for failure to register. And defendant cannot be found guilty of this lesser offense in the conspiracy information because by definition a conspiracy requires an agreement to violate the law, as I have already instructed you.

Therefore, only in the substantive information, and

there only in the first count, may you find the defendant guilty of this lesser offense, if you acquit him of the wilful offense charged in the information.

That is all pretty complicated; so I am going to let you take into the juryroom a blank form (385) for your verdict with four places for you to record a verdict of not guilty or guilty.

The first deals with the conspiracy information. The second deals with count 1 of the substantive information, wilful failure to pay the tax. The third deals with count 2 of the substantive information, wilful failure to register. And the fourth is to be considered only if you have not found the defendant guilty under any of the other three heads; it deals with the non-wilful failure to pay the special tax.

Now let us consider the evidence in the case. First I must point out that both the defendant and the Government have stipulated that the defendant has not paid the special tax and has not registered. This is to be considered as evidence of just those facts. This stipulation does not mean by itself that the defendant was required to pay the tax and register. Neither does it mean that the defendant wilfully failed to pay the tax and register. Those issues are for you to determine.

Now, the evidence which has been adduced before you involves statements by witnesses that wagering was carried on at the premises where this defendant was (386) running a butcher business, and the evidence as brought out in the testimony is that at a later time Treasury officials made a raid on these premises and made certain requests, made certain statements, made certain observations, all while this defendant was present on those premises.

Now, the defendant does not deny that the wagering took place on his place of business, but the defendant categorically denies that he knew that Aaron and Broussard were accepting wagers in his store and categorically denies that he aided them, conspired with them, or received any of the profit from the wagers, or what he is alleged to have said as the Treasury Agents testified when they accosted him and when they made the raid on his premises.

The testimony of the defendant's witnesses was not as long as the testimony of the Government witnesses but, of course, you are not to weigh the testimony in the case according to the amount of words to produce the case for the Government and the case for the defendant.

Now, you noticed, or you will notice, that the main prop of the Government's case rests on the (387) testimony of witnesses who have acknowledged participation in the events. I would say if you disbelieve their stories with respect to the defendant now on trial and do not find them credible, your verdict should be for the defendant, for essentially the entire case rests on such testimony.

There are two classes of evidence recognized and admitted in courts of justice upon either of which juries may lawfully find an accused guilty of crime. One is directed to positive testimony by an eye witness or participant to the commission of a crime; and the other is proof in evidence of a chain of circumstances pointing toward the commission of the crime by the defendant, and known as circumstantial evidence.

It is not necessary that the participation of the defendant should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally direct proof of

a criminal conspiracy is not available, and it will be disclosed only by the setting side by side of the circumstances.

To give you an example of what I mean by circumstantial evidence you can think of the case where (388) it is difficult to tell by looking out the window whether it is raining outside or not. You look out to see whether people have umbrellas up or not and if people do have their umbrellas up you are justified in assuming that it is raining although you have not actually seen the rain. That is circumstantial evidence that it is raining rather than direct evidence that it is raining.

In order to justify a jury in finding a verdict of guilt based on circumstantial evidence, the facts and circumstances must not only be consistent with each other and with the guilt of the defendant, but they must be inconsistent beyond a reasonable doubt with any reasonable theory of the defendant's innocence.

If you find that every circumstance relied upon as incriminating is susceptible of two constructions or interpretations, each of which appears to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt. No conviction can be based upon suspicion or conjecture, however strong. A conviction can be based only upon actual (389) proof of guilt beyond a reasonable doubt. Otherwise the jury should acquit.

With the general principles to which I have already referred on the law of conspiracy as a guide and my discussion of the substantive counts, you will consider all of the evidence and approach the important question of whether the prosecution has proved beyond a reason-

able doubt the existence of the conspiracy alleged in the information first, and if such conspiracy did exist whether the defendant was a party to it, and whether the defendant entered into it with the knowledge of its nature and purpose.

And with respect to the substantive information you will consider all of the evidence and approach the question whether the prosecution has proved beyond a reasonable doubt that the defendant was guilty of the violation of the statutes involving failure to pay the special tax and failure to register while engaged in the business of accepting wagers. Those are the only charges in the substantive information.

In dealing with the conspiracy count, as I have suggested to you, I think you had better go in steps. You must first determine from all the (390) evidence in the case whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine whether or not the defendant was a member of the conspiracy.

In considering whether or not the defendant was a member of a conspiracy, you must do so without regard to and independently of the statements and declarations of the other members of the conspiracy. You must determine the participation of the defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements and his own connections with the actions and the conduct of others in the conspiracy. However, once you have determined that defendant was a member of the conspiracy, using this test, you may then consider as if made by him the statements and declarations of other co-conspirators made in furtherance of the conspiracy and during the existence thereof as alleged.

Now, if after considering all the evidence in the case you believe the versions of the Government's witnesses beyond a reasonable doubt, you have sufficient evidence on which to base the verdict of guilty in the conspiracy information. If you disbelieve such (391) testimony, you should acquit on the conspiracy information.

In making reference to the testimony of witnesses, posing rhetorical questions, I have not attempted to touch all the facts, and my failure to comment upon any of the other parts of the evidence is no indication that it has been disregarded, or that I am placing undue influence and emphasis upon such testimony as I have recalled it to you. It was merely to focus attention towards some of the issues and facts to be considered by you in reaching a conclusion, and it is your recollection of the evidence and yours alone that governs. If your recollection of the testimony differs from mine, you will have no hesitancy, and I emphasize that as strongly as I can, in rejecting any statement I make.

I have attempted to avoid any comment which might suggest my personal views on the weight of the evidence, the credibility of the witnesses, the inferences to be drawn, or the importance of one phase or segment of the testimony as compared with another; and no comment made by me has been so intended.

The actions of the Court during the trial in ruling on motions or in overruling objections made (392) by the defendant, or sustaining objections made by the Government, are not to be taken by you as any indication of the guilt or innocence of the defendant. These are matters of procedure and law with which you have no concern. You are expressly to understand that the Court has no opinion as to the guilt or innocence of the defendant.

If I or either counsel have referred to testimony, and if either my reference or that of counsel differs from your recollection of the testimony, follow your recollection. As I have told you several times, you are the sole judges of the facts. The arguments of counsel addressed to the Court on the questions of law upon motions for admission or exclusion of evidence are to be disregarded by you; and if any answer of a witness is excluded or stricken from the record, you are to entirely disregard the question and the answer, for you may only consider matters admitted in evidence.

The duty of weighing and determining the credibility of the witnesses is exclusively yours. In your search for the truth, you should be guided by using your plain everyday common sense. You have seen the witnesses on the stand and observed their (393) manner of giving testimony. How did their story impress you? What degree of credit you should give the witness should be determined by his or her character, conduct, manner of testifying, and relation to the controversy in particular.

Are the witnesses interested in the outcome of the case? Is there a motive to testify falsely? Were those witnesses on behalf of the Government who were concerned in the matter professionally interested in securing a conviction? Where a witness has a personal interest, a direct interest, in the result of a case the temptation may be strong to color, pervert, or withhold facts. On the other hand, such a witness may be telling the truth, despite any alleged interest in the outcome. You must consider all the attendant circumstances in deciding whether and to what extent interest has affected the witness.

I have just instructed you with respect to the various factors which you might take into account in considering what weight should be given to the testimony of the witnesses who may have a motive in testifying falsely.

If you find that a witness wilfully testified falsely to a material fact, you are privileged to reject (394) all of his testimony or, if you elect to do so, you may believe part of it and accept that part of it which appeals to your reason or which was corroborated by other credible evidence and reject the rest.

The defendant did not testify in this case. That is his absolute right, and in no respect may his failure to testify be considered by you as any evidence against him, or as a basis for any presumption or inference unfavorable to him. You must not permit such fact to weigh in the slightest degree against him, nor should it enter into your discussions nor your deliberations.

The prosecution must prove the defendant's guilt by the required degree of proof, as already explained in these instructions.

The question of possible punishment of the defendant is no concern of the jury and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively on the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence.

On your oath as jurors, you cannot allow (395) consideration of the punishment which may be inflicted upon the defendant if he is convicted to influence your verdict in any way.

The jurors are entitled to their own opinion, but they should, however, exchange views with their fellow jurors.

That is the very purpose of jury deliberation, to discuss and to consider the evidence, to listen to the arguments of the fellow jurors, to present your individual views, to consult with one another and to reach an agreement based solely and wholly on the evidence.

You should do so without violence to your own individual judgment. You must decide the case yourself, and you should do so only after consideration with your fellow jurors of the evidence in the case, and you should not hesitate to change your opinion if it appears to be erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered and outweighed. You decide the case from the evidence and the evidence alone, and you must not be influenced by any assumption, conjecture, or any inferences not (396) warranted by facts proved to your satisfaction.

If in the course of your deliberations you require any of the exhibits, you may send out a note and they will be delivered to you. Likewise, with respect to copies of the information, if you should want them; and if you desire any testimony to be read, that may be done, or if you find that anything that the Court has said which becomes important in your deliberations requires further explanation, you may send a note to the Court stating your difficulty and an attempt will be made to clarify what is troubling you.

Your oath sums up your duty; and that is, without fear or favor to any man you will well and truly try the issues between this defendant and the United States of America according to the evidence given to you in court and the laws of the United States.

You may now take the case and consider it in view of its importance and the gravity of the charge made in the informations. It is important to the public and it is also important to the defendant.

Will counsel approach the bench, please.

* * * *

(400) * * *

(At this point the conference among Court and counsel at the bench out of the hearing of the jury terminated and the proceedings were resumed in the hearing of the jury as follows:)

The Court: Ladies and gentlemen, counsel have called to my attention the fact that at one time during the charge I used the word "indictment" instead of "information." As you perhaps noticed I was using a form of a charge as a basis for what I was saying to you, which charge had been used in other cases where the general instructions would be the same, and in that way I picked out the word "indictment" which I had used in a case which had been brought on by indictment.

Now, this case has been brought on by (401) information, and the difference is that the information can be used in misdemeanor cases and it is originated and presented to the Court simply on information given by the United States Attorney, whereas an indictment is found by a grand jury. But neither of them has the slightest effect in indicating the guilt of the defendant, so that you are not to consider the information in this case as any evidence that the defendant is guilty, just as I would charge in a case which has been brought on by indictment that the jury was not to consider the fact of the indictment as any evidence of guilt.

Also counsel have requested that I read to you the full stipulation that was entered into by the defendant with the Government with respect to the lack of necessity of certain proof in the case, and which reads:

> "It is hereby stipulated and agreed by and between the United States of America and the defendant Salvatore Apuzzo as follows:
>
> "That since it is the defendant's contention that he was not engaged in the business of accepting wagers in the year of 1953, the defendant stipulates that he did not pay the special occupational tax (402) imposed by Section 3290, Title 26 of the United States Code, referred to in these two informations, and that he did not register with the Director of Internal Revenue as required by Section 3291, Title 26 of the United States Code, referred to in these two informations."

And that is signed Salvatore Apuzzo, Mr. Roseman, attorney for the defendant, and Mr. George S. Leisure, Jr., Assistant United States Attorney.

I think that is all, gentlemen.

* * * *

No. 282

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—vs.—

SALVATORE APUZZO,

Appellant.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

ARNOLD D. ROSEMAN,
Attorney for Appellant,
120 Broadway,
New York 5, N. Y.

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United States Court of Appeals

For the Second Circuit

C 145-283
C 147-278

UNITED STATES OF AMERICA,

Appellee,

—vs.—

SALVATORE APUZZO,

Appellant.

Statement Under Rule 15(b)

This is an appeal from a judgment of conviction by defendant-appellant. He was convicted on information #C 145-283 containing two counts charging him with failing to pay a special occupational tax and failing to register (Title 26, Secs. 2707b, 3277, 3290, 3291(a), 3292 and 3294) and one count in information #147-278 charging him with conspiracy with two other individuals (Title 18, Sec. 371).

Trial was held in the United States District Court for the Southern District of New York before Hon. Edward J. Dimock and a jury on November 9, 10, 14 and 15, 1955. The jury returned a verdict of guilty as to all three counts. The defendant-appellant was sentenced on December 13, 1955 to 60 days imprisonment, $3,000 commuted fine and 4 years probation.

This is also an appeal from intermediate orders denying (a) suppression of evidence dated May 23, 1955 (Noonan, J.), (b) for bill of particulars dated May 31, 1955 (Leibell, J.) and (c) suppression of evidence, bill of particulars and dismissal dated July 5, 1955 (Walsh, J.).

Notice of appeal to this Court was filed on December 15, 1955, appealing from the judgment of conviction and aforementioned intermediate orders.

Information (No. C 145-283)

(409)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 145-283

C 147-278

UNITED STATES OF AMERICA,

—vs.—

SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD,

Defendants.

The United States Attorney charges:

On or about the 5th day of August, 1953, the defendants SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD who engaged in the business of accepting wagers, in the County of New York, New York, individually and as a co-partnership during the month of August, 1953, did unlawfully, wilfully and knowingly fail to pay the special tax imposed by law to the Director of Internal Revenue for the Upper Manhattan District of New York, New York. (Title 26, United States Code, Sections 2707(b), 3277, 3290, 3292 and 3294.)

Information (No. C 145-283)

SECOND COUNT

The United States Attorney further charges:

On or about the 5th day of August, 1953, in the Southern District of New York, the defendants SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD who engaged in the business of accepting wagers in the County of New York, individually and as a copartnership during the month of August, 1953, and who were required to pay the special tax imposed by law, did unlawfully, wilfully and knowingly fail to register with the Director of Internal Revenue for the Upper Manhattan District of New York, at New York, New York, as required by law. (Title 26, United States Code, sections 2707(b), 3277, 3291(a), 3292 and 3294.)

J. EDWARD LUMBARD
United States Attorney

Information (No. 147-278)

(484)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The United States Attorney charges:

1. From on or about the 28th day of July, 1953, up to and including the 5th day of August, 1953, in the Southern District of New York, the defendants, SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD, and others to the United States Attorney unknown, did unlawfully, wilfully and knowingly combine, conspire, confederate and agree together and with each other to violate the United States Code, Title 26, Sections 2707(b), 3277, 3290, 3291(a), 3292 and 3294.

2. It was a part of the conspiracy that the said defendants unlawfully, wilfully and knowingly would engage in the business of accepting wagers in the County of New York, New York, individually and as a co-partnership, and fail to pay the special tax imposed by law to the Director of Internal Revenue for the Upper Manhattan District, at New York, New York.

3. It was a further part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would engage in the business of accepting wagers, in the County of New York, New York, individually and as a co-partnership, and would fail to register with the Director (485)

of Internal Revenue for the Upper Manhattan District of New York, at New York, New York, as required by law, in violation of Title 26, United States Code, Sections 2707(b), 3277, 3291(a), 3292 and 3294.

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1953, in the Southern District of New York, the defendant SAMUEL AARON accepted a wager from Edward E. Goodwin.

2. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1953, in the Southern District of New York, the defendant ERNEST BROUSSARD accepted a wager from Columbus Fletcher.

3. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 5th day of August, 1953, in the Southern District of New York, the defendant SAMUEL AARON accepted a wager from Columbus Fletcher.
(Title 18, United States Code, Section 371.)

J. EDWARD LUMBARD
United States Attorney

Excerpts from Transcript of Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 145-283
C. 147-278

[SAME TITLE]

Before:

HON. EDWARD J. DIMOCK, *D.J.*, and a Jury.

New York, November 9, 1955,
3.00 o'clock p.m.

Appearances:

PAUL W. WILLIAMS, ESQ.,
United States Attorney, for the Government;
By GEORGE S. LEISURE, JR., ESQ.,
Assistant United States Attorney.

BENJAMIN LEVY, ESQ.,
Attorney for Defendants
Samuel Aaron and Ernest Broussard.

ARNOLD D. ROSEMAN, ESQ.,
Attorney for Defendant Salvatore Apuzzo.

Edward E. Goodwin—for Government—Direct

(7) Edward E. Goodwin, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

Q. Mr. Goodwin, will you tell the Court and jury how you are employed at the present time? A. I am an investigator for the Alcohol & Tobacco Division of the Treasury Department.

Q. And how long have you worked for the Treasury Department? A. 14 years.

Q. During the summer of 1953 were you given a special assignment by the Treasury Department? A. I was.

Mr. Rosenman: Judge Dimock, may I at this time ask that the other witnesses be excluded from the courtroom during the testimony?

The Court: So directed.

Q. Will you tell us, Mr. Goodwin, what the nature of that assignment was in the summer of 1953? (8) A. I was assigned to assist the Rackets Squad of the Intelligence Division of the Treasury Department in their investigation of violations of the wagering tax laws.

Q. Now, directing your attention to July 28, 1953, will you tell us what you did on that day? A. On that day at about 12:30 in the afternoon I entered the butcher shop at 363 Lenox Avenue in New York City.

I saw a man whose name I now know to be Samuel Aaron and another man standing behind the counter of the butcher shop.

There were about four or five people standing in front of the counter in front of Samuel Aaron. I got in the line, and as the people moved up I saw that they were given slips of paper upon which were written numbers, and giving the money to Samuel Aaron.

When my turn came I gave Samuel Aaron a slip of paper upon which I had written about a half hour earlier the number 503, the amount 50 cents, and the initials R.G. I gave him a dollar bill with the slip.

Samuel Aaron looked at the slip and then gave me 50 cents in change.

(9) I left the shop after that.

Q. Did you have any conversation with him at that time at all?

. . . . . .

Q. Now, Mr. Goodwin, I direct your attention to July 30, 1953, and ask you if you will tell us, (10) please, what you did on that day? A. On July 30, 1953, at about 12.30 in the afternoon, I again entered the shop at 363 Lenox Avenue.

I saw two men behind the counter of the shop, and one of the men was Samuel Aaron.

On this occasion I handed a slip of paper upon which I had written about a half hour earlier the same No. 503, 50 cents, and the initials E. G.—the initials R. G., I am sorry.

There were a few people in the shop waiting in front of Mr. Aaron when I walked in the place. When my turn came I gave Samuel Aaron a slip of paper which bore the data.

Samuel Aaron looked at it and took a pad which was up on top of the counter and copied the inscription from the slip I had given him and he said to me, "The next time make your slip larger."

Q. Did you have any occasion to return to the butcher shop again on that day? A. Yes, about ten minutes after I left the shop I returned to the shop, and on that occasion I gave him a slip of paper upon which I had written the number 239, the amount 50 cents, and the initials (11) E. G.

I left the shop after giving him the 50 cents together with the slip of paper.

Q. Now, on the next day, the 31st of July, did you return again? A. Yes, on the 31st.

Q. Will you tell us about that? A. On the 31st of July I went there at about 12.30 in the afternoon.

I saw two men behind the counter; one of the men was Samuel Aaron. I saw several people in the shop waiting in line in front of Samuel Aaron.

I gave when my turn came—I gave Samuel Aaron a $1 bill together with a slip which I had already prepared. This slip bore the notation 503, 50 cents, R. G.

Samuel Aaron inspected the slip and then gave me 50 cents in change.

About—I left the shop and about ten minutes later I returned to the shop and at that time I asked Samuel Aaron what was the winning number yesterday.

Samuel Aaron did not say anything to me in answer. He pointed to a scale which was up on top of the counter, and looking at the end of the scale (12) that he pointed to I saw that three numbers had been pasted, the type of numbers used to denote the numbers or the price of meat, which had been pasted on the end of the scale. The numbers were 777.

Q. Did you leave the place? A. I left the place at that time.

Q. Now, on August 3 will you tell us what you did? A. On August 3 I was accompanied by Investigator Fletcher of the Treasury Department, at about 12.30 when I entered the shop at 363 Lenox Avenue.

On that occasion there were several people in the shop waiting in line. We got in line and when my turn came I gave Samuel Aaron a slip of paper which bore the notation 503, 50 cents, R. G., together with a $1 bill.

Samuel Aaron looked at the slip and then gave me 50 cents change.

I saw Investigator Fletcher stop in front of the second man who was behind the counter.

Inspector Fletcher also prepared a slip of paper before he entered the shop, and on this slip of paper he had made —he had written a three-digit numeral and an amount of money, some initials— (13) I don't know which initials were used. I don't remember.

The second man accepted the slip of paper and a $1 bill, to the best of my recollection a $1 bill, from Inspector Fletcher—pardon me, Investigator Fletcher.

He then passed the bill and the slip to Samuel Aaron who was standing beside him, and Samuel Aaron after inspecting the slip handed the 50 cents in change, the slip and the bill—after accepting the slip and the bill handed 50 cents in change to the man who was standing behind the counter with him. This man in turn handed the 50 cents in change to inspector Fletcher. We then left the shop.

* * * * *

(14) Q. Will you tell us, Mr. Goodwin, what happened when you entered the butcher shop on August 5? A. On August 5 about 1.20 in the afternoon Investigator Fletcher and I entered the butcher shop at 363 Lenox Avenue.

We saw two men standing behind the counter—I believe there were two people, to the best of my recollection, about two people, two or three people in the shop, standing in front of Samuel Aaron.

In my hand I held a slip of paper upon which I had written 503, 50 cents, R. G.

(15) Q. Had you previously prepared that slip? A. That slip of paper had been prepared about two hours earlier in this building in the office of Assistant U. S. Attorney Patterson in the presence of Special Investigator Gianafacio, Assistant U. S. Attorney Patterson, Special Agent Wilson, of the Intelligence Division.

* * * * *

Q. What did you do with the slip that you prepared after you got in the butcher shop? A. After entering the butcher shop I saw two men standing behind the counter. One of them was Samuel Aaron and the other man was standing in such (16) a position that I naturally approached him.

I gave him the slip of paper together with 50 cents. The slip of paper bore the inscription 503, 50 cents, R. G.

The man who accepted the slip from me inspected the slip and accepted it with the money.

* * * * *

(20) *Cross Examination by Mr. Roseman:*

* * * * *

(21) Q. And this was the first time you went out on a case like this; is that right? A. That is right.

Q. The first time? A. Yes.

Q. is that right, Inspector? A. Yes, Investigator.

Q. And it was the last time, Investigator? A. Yes.

Q. The first and last? A. That is right.

Q. Now, you testified before the Judge and jury, before the jury and Judge Dimock, that it was 12.30 one day and one o'clock another day, 12.15 another day? (22) A. Yes.

Q. You remember those times very well, don't you? A. Yes.

Q. You remember times very well, don't you? A. Yes.

Q. Exceptionally well, Mr. Goodwin? A. Not exceptionally. It was the practice to go every day about the same time.

Q. Well, then, you don't know for sure whether it was 12, or 12.30, or one o'clock? A. Yes, I know.

Q. You do? A. Yes.

Q. And it is your testimony, is it, Mr. Fletcher— A. Goodwin.

Q. Mr. Goodwin, I am sorry, but your partner is Mr. Fletcher, is that right, Mr. Goodwin? A. Yes.

Q. That on a certain day you went there? A. Yes.

Q. All right. What time did you go there on July 28? A. About 12.30 in the afternoon.

Q. Was it before or after? A. Maybe two minutes. (23) I said about 12.30.

Q. And July 30th? A. The same.

Q. The 31st? A. About the same time.

Q. August 3rd? A. About the same time.

Q. August 5th? A. About 1.20 in the afternoon; at about 1.20 in the afternoon.

Q. And how long were you in the store each particular day, five minutes? A. Well, it depends on the number of people who were ahead of me on that day.

Q. Tell the jury. A. About—

Q. On July 28th? A. About three or four minutes.

Q. July 30th? A. About the same time.

Q. July 31st? A. About the same length of time.

Q. August 3rd? A. About the same length of time.

Q. August 5, 1953? A. I think that was about the shortest.

Q. About a minute? A. Well, longer than that. I had to wait in line, probably two minutes or three minutes.

(24) So you would say in summarizing, Mr. Goodwin, that on the five days that you testified to it would be between two and four minutes? A. That is about correct.

Q. From the time that you entered the store to the time that you departed; is that right? A. That is about right.

Q. Now, did you see any meat being sold in the store? A. On one occasion, on one day I saw one parcel of meat sold.

Q. And did you see the meat at a counter there? A. I saw meat under the counter.

Q. A Frigidaire? A. Yes.

Q. Also in the window? A. Yes.

Q. And during all those times, Mr. Goodwin, you did not see this defendant Apuzzo, did you? A. No, sir.

* * * * * *

(25) New York, November 10, 1955;
10.30 o'clock a.m.

* * * * * *

COLUMBUS FLETCHER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

* * * * *

(26) Now, directing your attention to August 3, 1953, Mr. Fletcher, would you tell us what you did on that day? A. On August 3, 1953, at about 12.30 p.m., accompanied by Investigator Edward E. Goodwin I entered the meat market located at 363 Lenox Avenue.

As I entered the meat market I observed behind (27) the counter two men who were later identified to the officers of the Alcohol & Tobacco Tax Unit, of 143 Liberty Street, and I learned their names to be Samuel Aaron and Ernest Broussard.

In front of Mr. Aaron at that time was a line of people, and I observed Investigator Goodwin getting on that line. I stood alongside and observed—I saw Mr. Aaron write on a 3 x 5 pad of the butcher's numbers and initials that the men at the front of the line gave him. I also saw him give them money.

I observed Investigator Goodwin give to Mr. Aaron—he had made a slip of paper which he previously prepared, and he gave him a dollar bill.

Mr. Aaron accepted the slip and the dollar bill and give him 50 cents in change.

As I waited in line Mr. Broussard came over to me and I handed him a slip that I previously prepared, bearing the notation 671; 50, and with the initials C.F. for identification.

He accepted the slip and the dollar bill, looked at the slip and gave the slip and the dollar bill to Mr. Aaron, who in turn gave him 50 cents in change, which he gave me.

I then left the premises.

(28) Q. Did you return to the same location on the 5th day of August 1953? A. Yes, sir, I did.

Q. What were the circumstances at that time? A. On the 5th of August 1953, at about 1.20 p.m. in the afternoon, accompanied by Investigator Edward E. Goodwin, I again entered the meat market.

At that time I observed two men behind the counter. One of those men was Mr. Aaron and in front of Mr. Aaron was a line of people.

And I observed several of the people in line give him slips and some called out numbers and he put it down on a pad of paper. I saw them give him money also.

I observed Investigator Goodwin give him a slip at that time together with money.

I in turn gave to Mr. Aaron a slip of paper that I had previously prepared that day at the office of Assistant U. S. Attorney Patterson, together with a duplicate copy of that slip.

* * * * *

(32) Q. Now, Mr. Fletcher, with respect to Government's Exhibit 2, which you testified is the original slip, what did you do with that when you were in the premises of 363 Lenox Avenue on August 5? A. The original slip there I gave to Mr. Aaron at that time together with the $20 bill.

Mr. Aaron accepted the bill, the $20 bill, and he looked

at the slip and gave the $20 bill and the slip to another man who was in the store at that time.

The latter man gave me $19 in change.

I then asked Mr. Aaron what number won the previous day, August 4, 1953.

He replied that No. 337 won.

I then left the premises.

* * * * * *

(36) JAMES J. GUTHRIE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

* * * * *

Q. What is your educational background, Mr. Guthrie? A. I am an attorney, a member of the bar of the State of New York.

* * * * *

(53) Q. Mr. Guthrie, before the jury was excused you were telling us about the search of the safe by Mr. Apuzzo, or that Mr. Apuzzo had opened in the store.

Did you find cash in the safe? A. We found approximately $10,000 in the safe.

Q. In cash? A. In cash.

Q. Were there also documents and other things in the safe? A. There were various insurance policies, leases, and there were also two envelopes, one of which contained nine policy slips and another of which contained six policy slips.

Mr. Leisure: Will you please mark these three and four for identification.

(Marked Government's Exhibits 3 and 4 for identification.)

Q. Now, Mr. Guthrie, I am going to show you Government's Exhibit 3 for identification, which is a brown envelope containing nine slips of paper with writing on them, and ask you if that was found in the safe? A. That was found in the safe. I noted the fact that it was so found and put my initials on (54) it at the time.

Q. And did you open the envelope at that time to look? A. No, the envelope was open.

Mr. Leisure: May the record show that Government's Exhibit 3 for identification has nine separate slips of paper in it.

Q. I show you Government's Exhibit 4 for identification and ask you what that is? A. This second envelope contained six slips and 78 individual plays.

Q. And that was also in the safe? A. That was also in the safe, and also was initialed by me at the time of removal thereof.

Mr. Leisure: I offer Government's Exhibits 3 and 4 for identification in evidence, and if there are any markings other than what was on the envelope at the time that it was sealed and stapled, the Government will consent to have such markings deleted therefrom.

Mr. Roseman: I make the same objection, your Honor, further that no proper foundation has been laid, and there has been no connection with this defendant; incompetent, irrelevant and immaterial, (55) and also on the further grounds that I argued before your Honor in connection with the motion, and if there are any prejudicial markings on these papers they should be removed.

James J. Guthrie—for Government—Cross

The Court: The prejudicial markings will be obscured.

With respect to the other objections, they are overruled.

Mr. Roseman: Exception.

* * * * * *

(64) Q. Was there a further conversation with Mr. Apuzzo after the safe had been searched? A. Immediately after we finished with the safe the search was still going on in the store for additional policy slips.

We asked Mr. Apuzzo as to the location of any additional slips in the store.

At that time he beckoned to Ernest (65) Broussard, who was behind the counter, toward the front of the store, the north end of it, and said to Ernie—pointed to a scale on the counter and said, "Give them the slips."

Q. And what happened then? A. At that point Mr. Broussard removed the weighing platform of the scale—it was a white scale—and then a mechanical part of the scale directly under the weighing platform, and there were numerous slips, policy slips.

Q. Did you collect those policy slips? A. Those slips were taken from the scale and placed in an envelope, brown envelope, and taken by us along with other evidence.

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(69) *Cross Examination by Mr. Roseman:*

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(70) Q. Mr. Guthrie, did you turn over the evidence in this case to the state or city authorities for a state violation? A. I did not.

* * * * * *

(71) Q. Did you know that he had filed income tax returns for the butcher business since 1946, 1947, 1948, 1949,

'50, '51, '52, and '53 as running a retail butcher shop at 363 Lenox Avenue? A. I do not know that of my own knowledge, no, sir.

Q. Have you had occasion to examine his income tax returns? A. I personally have not.

Q. Have you been told of his income tax returns? A. I have.

Q. And do you know as a fact, Mr. Guthrie, that in the year 1946 Mr. Apuzzo filed an income tax return showing $44,000 worth of receipts for sales of meats in the retail butcher shop, and that the cost of the goods was $31,774.20? A. I did not know that of my own knowledge.

* * * * *

(73) Q. Did you make any investigation, Mr. Guthrie, to determine what income tax returns were filed by this defendant for the years 1946 to 1953? A. I did not.

* * * * *

(74) Q. And Wilson told you that the United States Attorney's office had inquired about Mr. Apuzzo's (75) tax returns for 1953? A. That would be a matter of course, yes.

Q. I didn't get your answer, sir. A. I believe that was the substance of it, sir, yes.

Q. And did he tell you that he was seeking information as to what was contained in that return? A. That would be the sole objective, I should think.

Q. And were any figures discussed regarding the cost of goods sold and the sale of meat at his retail butcher shop? A. Not with me.

* * * * *

(77) Q. Mr. Guthrie, when you arrived at the premises 363 Lenox Avenue, on the afternoon of August 5, 1953, who was with you? A. Special Investigator Giantiasio,

Specal Investigator Lemler, Special Investigator Di Cupua.

(78) Q. How do you spell that? A. D-i- C-u-p-u-a—I believe that is correct.

Q. Is that all? A. Also present—

Q. I said who were with you? A. All right. I believe initially that is all that was with me.

Q. And you arrived there by automobile? A. I did.

Q. You walked into the store, or all four of you? A. We did.

Q. And did you have anything in your hand? A. Nothing.

Q. You had no revolver? A. Did not.

Q. You never had a revolver? A. Did not carry one that day.

Q. I see. How about the other three men? A. No one had a revolver in their hands.

Q. You are sure of that? A. Positive.

Q. And did you walk immediately to the back of the store? A. Mr. Lemler, Mr. Giantiasio and myself.

Q. And so the jury can obtain your knowledge of the store, on the front is a sign? A. Offhand I don't recall.

(79) Q. And is there any name under the sign? A. Offhand I don't recall that, either.

Q. And did you see the name, Apuzzo, on the window? A. I did not.

Q. You did not notice it or you didn't see it? A. I did not notice it.

Q. Well, is it your testimony that it was not there— A. It is not a question—

Q. —or that you— A. I did not look at the window, at least I don't recall looking at the window.

Q. And was there meat in the window? A. There was a meat case in the window, yes.

Q. Containing meat? A. Containing meat.

Q. And when you walked into the store there was a counter? A. I might say that I observed the fact that there was meat in the window after we got into the store and during the course of the search.

Q. And did you see meat on the counter? A. There was meat in the counter.

Q. And was it stacked full? A. I don't know what you mean by "stacked full."

Q. And did you enter any refrigerator? A. We did.

Q. And was there meat in the refrigerator? (80) A. There was.

Q. And did you see the stamps on that meat indicating when it was delivered or when it was purchased? A. I don't quite get your question.

Q. Well, I will reframe it, Mr. Guthrie. At any time in your examination of the meat in the refrigerator did you notice the date, the stamp date of the United States Government indicating when it was shipped? A. No, I was not interested in that, sir.

Q. You did not notice it? A. No.

Q. You did not pay any attention to it? A. No.

Q. And after the refrigerator there is a hallway to the back, to the rear of the store? A. You have the front part of the store as you enter. Meat counters around the right as you enter. The refrigerator or icebox you might call it, the large wooden box, framed in wood, was on the right toward the rear of the store. To the left of that refrigerator you had a corridor, the size or length of the refrigerator leading to the back room.

* * * * *

(86) Q. And who was in the back room when you three arrived? A. Mr. Apuzzo, a tie salesman, a man who identified himself as a tie salesman, whom I believe was named Schindler. Also present was a man by the name of Avitable, something like that.

Q. Had you seen this tie salesman showing his wares, and was his box open? (87) A. His box was open on the table that I described before.

Q. And the ties were disarranged? A. The tie box was open.

Q. And was Mr. Apuzzo holding a tie in his hand? A. They were examining ties, evidently buying them.

* * * * *

(99) Q. Did Mr. Apuzzo open the safe for you? A. He did.

Q. Immediately? A. No, not immediately.

Q. Excuse me? A. Not immediately.

Q. Did you ask him to? A. We did.

Q. And what did he say? A. He stated he did not know the combination to it.

Q. And did you tell him that you were going to take the safe downtown? A. I did.

Q. And did he say to you that his brother-in-law knew the combination, a man by the name of Isidori, and that he would have to call him for it? A. There was something said to that effect, that he did not have the combination, that somebody else did.

Q. And did you hear him make a telephone call to Mr. Isidori? A. I do not recall, sir.

Q. Did you see him make the telephone call? (100) A. I do not recall.

* * * * *

(104) Q. What did you overhear? A. There was an additional question of Mr. Apuzzo as to what he was doing there, who he was.

He identified himself.

Other gentlemen were interviewed. Men in the front of the store were being interviewed.

* * * * *

(107) Q. Didn't he tell you that the reason he did not want the safe taken downtown was that he had his money (108) in there? A. That was not said, sir, until after he asked us whether we were going to take it, and that was after the safe was open, not prior, sir.

Q. And he said his money was in there? A. No, not prior. We did not know what was in the safe.

Q. But at some time you saw that his money was there? A. Not that his money was there. He said, "That is my money" after it was opened, the safe.

Q. And he did not claim ownership of anything else, did he? A. No.

Q. Just the money? A. That is right.

Q. And that was money was not found in the open part of the safe; there was a compartment with a lock in there? A. There are many compartments with locks.

Q. And he did not have a key to one compartment in which money was found? A. We had to break it open forcibly.

Q. He did not have a key? A. Not to my knowledge.

Q. He opened it? A. The combination.

Q. With the key inside? A. Not to my knowledge.

(109) Q. Did he tell you why he kept his money there? A. Yes.

Q. Tell the jury why. A. Mr. Apuzzo stated that he kept his money there because the Federal Government had liens of almost a million dollars against his income.

Q. That is right. And he could not put it in the bank because the Government would take it, is that right? A. The Government had assessed taxes of approximately three-quarters of a million dollars.

Q. And he told you that the assessment was erroneous? A. That is the usual claim, yes, sir.

Q. Did you see him call over Mr. Broussard and (110) say to him, "If you have any slips here give it to these people"? A. That is not what he said, sir.

Q. What did he say? A. He said, "Ernie, give them the slips in the scale," and pointed to the scale.

Q. Did you see this defendant point to the scale? A. Very definitely.

Q. With his right hand or his left hand? A. I do not recall.

Q. But he pointed, Mr. Guthrie? A. Yes, very definitely.

Q. You are sure of that? A. Very definitely.

Q. You are sure of that statement that he pointed, and that you did not see Mr. Broussard being called over and being asked or told, "If you have slips here give it to these men"? A. We asked Mr. Broussard. He did not know where they were, the slips in the drawer, until Mr. Apuzzo directed him to them.

Q. Did you see Mr. Apuzzo handle any of these slips? A. No.

(111) Q. And I presume that you questioned Mr. Apuzzo, and did he admit that he was accepting policy slips? A. No, sir.

Q. Did he ever admit that to you? A. No, sir, he did not.

Q. And you do not have a written statement, do you, that he admitted accepting policy slips, Mr. Guthrie? A. No, sir.

Q. And the U. S. Attorney's office does not have it, is that right, Mr. Guthrie? A. That, sir, you would have to ask the U. S. Attorney.

Q. None of your men have it? A. To my knowledge, no.

(112) Q. And you showed him to certain people down (113) there, didn't you? He was viewed? A. Yes.

Q. Nobody identified him? A. No.

* * * * *

(116) Q. Did you ever ascertain who had access to the safe? A. Yes, sir.

Q. Who besides Mr. Apuzzo? A. No one to my knowledge other than Mr. Apuzzo.

Q. That is your testimony, that no one had access? A. No, sir, it is not my testimony. The only one I know of who did access was Mr. Apuzzo.

Q. You mean there may have been others? A. Without my knowledge, certainly.

Q. There could have been? A. Oh, surely.

Q. One question, Mr. Guthrie. Were the bills of Mr. Apuzzo showing the purchases of meat taken from the store? A. Certain records of that type were removed, yes.

Q. Were they ever returned? A. I believe, sir, there was a request for their return in the Tax Court action that is now in progress which you questioned me about previously.

* * * * *

(117) Q. Now, Mr. Guthrie, do you recall what those purchase bills or invoices indicated? A. I personally have never examined them, sir.

* * * * *

(133) Q. At any time did you see this defendant behind the counter? A. No, sir, excepting when he was on the—if you might say behind the counter, it was at the end of the refrigerator, adjacent to the counter. Then he went to the safe, which was behind the counter, opened (134) that. After the contents were looked at, and inventoried, he then took his place again by the refrigerator and pointed to the scale thereafter.

Q. Did you see him at any time go near the scale? A. No.

Q. Did you ever see him put anything there? A. No.

Q. And it was after a Mr. Broussard had come over to him that you say the defendant pointed to a scale? A. No, sir.

Q. Is that right? A. No, sir, Mr. Broussard—

Q. What is your testimony? A. Mr. Broussard was standing on the counter side near the front door window—the front window of the shop, which was about as far away from Mr. Apuzzo that he could get within the limits of the shop. The scale, then, was between Mr. Apuzzo and Mr. Broussard. Mr. Apuzzo pointed to the scale and Mr. Broussard walked—

Q. How far was Mr. Broussard away from Mr. Apuzzo when, as you said, he pointed to the scale? A. Oh, approximately 10 feet to 15 feet.

(135) Q. He didn't say anything to him, did he? A. Oh, yes, he did.

Q. He spoke to him at a distance of 10 to 15 feet? A. That's right.

Q. What did he say to him? A. He said, "Ernie"—in fact—not his exact words.

Q. In effect? A. "Ernie, show them the slips under the scale," and pointed to the scale, and that was it.

Q. And Mr. Broussard went over to the scale; is that right? A. That is correct.

* * * * *

(138) MARTIN D. LEMLER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

* * * * *

(139) Q. What did you do then? A. I knew Mr. Apuzzo by sight when I entered the place prior to that.

Mr. Rosenman: I didn't get that.

The Witness: I knew Mr. Apuzzo by sight (140) before I had entered the premises.

A. (Continuing) When we got there, I had all four of them identify themselves when other investigators were present. Mr. Apuzzo had a driver's license listing his name as Salvatore Apuzzo at some Scarsdale address, and had $1,390-some-odd on his person.

Q. Did you search him yourself? A. No. I had him remove the things from his pocket and place them on a desk, and the other men that were present, that is, the other friends of Mr. Apuzzo.

I asked Mr. Apuzzo how long he had been running this place, or words to that effect. He said he was operating—he leased the butcher shop. That's all he ran, that part of the business, was the butcher shop.

I said, "Who did you lease it from?"

He said, "From a man named John Sloan."

I said, "Is Mr. Sloan here now?"

He says, "No."

"Where can I get in touch with Mr. Sloan?"

He says, "363."

"You mean in this building, 363?"

He says, "No. I think it's Ninth Avenue."

(141) I recorded the name and address.

* * * * *

(142) Q. Now, did you have a further conversation with Mr. Apuzzo after you finished searching the safe? A. Yes. I then told Mr. Apuzzo that I wanted (143) the policy slips on the premises after the safe had been opened. He turned to the butcher, a gentleman named Broussard, I believe, and he pointed to a scale, probably three feet away from where we were standing, and he said, "Give him the slips."

Q. And then what happened? A. Mr. Broussard removed the base or the platform of this meat scale, and there I found 150—150-some-odd slips totaling thousands of numerals.

* * * * *

(146) *Cross Examination by Mr. Roseman:*

* * * * * *

(147) Q. And were you armed prior to entering the premises? A. That's right.

Q. Were you armed with firearms? A. That's right, sir.

Q. And at any time did you put these firearms in your hand? A. I did, sir.

* * * * * *

(149) Q. Did you see the defendant Apuzzo? A. I did.

Q. What was the look on his face? A. Not any different than it is now.

Q. He didn't look startled? A. If he did, I didn't notice it.

Q. Did he look amazed? A. I don't recall.

Q. Did he look frightened? A. Not that I noticed.

* * * * * *

(157) Q. Didn't you hear the man with the box of ties say he was selling some ties in the back? A. Yes.

Q You heard that? A. Oh, he told me that later on.

Q. When did he tell you that? A. After I was there one or two moments.

Q. But he did tell you that? A. Oh, yes.

Q. And did you hear Mr. Guthrie say anything to these men? A. I don't recall.

Q. Did you hear Mr. Giantjasio say anything to these men? A. I believe both Mr. Guthrie and Mr. Giantiasio—

Q. No, I asked if Mr. Guthrie said anything, and you said you don't recall. Are you now going to change your testimony? A. No.

(158) Q. Do you now recall— A. I would rather say yes, they assisted me in questioning all four persons.

Q. I didn't ask you whether or not they assisted you. I asked you whether or not they said anything or did

Mr. Guthrie say anything? A. I don't recall just if he did say anything.

Q. Well, now, did Mr. Giantiasio question Mr. Apuzzo? A. Not in my presence.

Q. Did you question Mr. Apuzzo? A. I did.

Q. What did you say to him and what did he say to you? A. I asked Mr. Apuzzo how long he had been running this place.

Q. Referring to the butcher shop? A. Referring to the butcher shop, or referring to the place in—

Q. What did he say? A. He said he had recently leased it from a Mr. John Sloan.

Q. And did you ask him how long he had been at those premises? A. Yes. And I believe his reply was "A short time," a short period or short something of that nature.

(159) Q. When you say "short," that could be a year, five years, two months or what? A. I don't know what he meant by it.

Q. Well, did you ask him how long in period of time he had been there? A. Yes. "A short time."

Q. He didn't say to you what "A short time" was, what he said was "A short time"? A. That's right. He said "A short time."

Q. And did you ask him whom he employed in the butcher shop? A. Yes.

Q. And what did he tell you? A. He employed two persons, Mr. Broussard and a Mr. Robinson. I believe that's the name.

Q. And were they the ones who sold meat in the front? A. That's right, among other things.

Q. He said to you, among other things, they sold— A. No. He didn't say that.

Q. That's what you just told the jury. A. The way you put that question I misunderstood it, perhaps.

Q. Well, what did he say, so that the jury will know?

Martin D. Lemler—for Government—Cross

A. He told me that he employed these two men (160) as butchers, Mr. Broussard and Mr. Robinson.

(161) Q. Did he ever tell you he was in the policy business? A. No, sir.

Q. In fact, he told you he was in the butcher business? A. That's right.

Q. In fact, he also told you that if there was policies, he didn't know about it; that's right, Mr. Lemler, isn't it? A. No, I don't believe he said that.

Q. In words or substance? A. He told me he didn't have anything to do with policies, if that is what you mean.

Q. That is what I am after, Mr. Lemler. A. Yes.

(163) Q. Sure. You asked him to open the safe, and he said he couldn't he didn't know the combination. He was excited. Didn't he tell you he had to call his brother-in-law to find out the combination, Mr. Isidore is that right, Mr. Lemler? A. I don't think he ever—no, that is not so.

Q. Did he make a telephone call to ascertain the combination? A. He did not.

(164) Q. He just opened it? A. That's right.

Q. Just like that? A. That's right.

Q. First he made an objection; is that right? A. That's right.

Q. So he didn't open it just like that? A. That's right.

(165) Q. In fact, that was the reason he was taken downtown. Weren't you looking for someone to identify him as accepting wagers? Wasn't that the purpose? A. I am speaking for myself. I arrested him, not for accepting wagers.

Q. What did you arrest him form? A. For operating that wagering place.

Q. Is that what you arrested him for? For operating a wagering place? A. Gambling place.

(166) Q. Is that a Federal crime? A. It's a Federal crime.

Q. Don't you know that that is a state crime, Mr. Lemler? A. The state has no bearing on—

Q. But you know it is a state crime? A. It has nothing to do with the Federal Wagering Act.

Q. There is no Federal law— A. Yes; there is.

* * * * * *

Q. How many more cases like this have you participated in, Mr. Lemler? A. On that day.

Q. As a raiding— A. On that date.

Q. At any time in your life? A. I think that was the first one made in this district.

(167) Q. And how many more have you participated in? A. None.

Q. Zero? A. That's right.

Q. The first and the last; is that right, Mr. Lemler? A. Yes, sir.

* * * * *

Q. He challenged you as far as operating an establishment was concerned, didn't he? He challenged you? A. He told me didn't know—he didn't do any gambling on the premises.

* * * * *

(170) Q. Did you take those checks? A. I took checks out of the safe.

Q. Did the defendant ask you to return those checks on August 5, 1953? (171) A. He might have.

Q. Did he tell you what those checks were for, on August 5, in any conversation had with him? A. I think I asked him what he was doing with all those City, State and Federal checks.

Mertin D. Lemler—for Government—Cross

Q. And what did he say? A. He told me he just cashed them for customers.

Q. Who purchased meat? Didn't he tell you that? A. Well, I don't recall that part of it. He did cash them for customers.

* * * * *

(172) Q. Did you hear him discuss with Mr. Broussard that if there were any slips to please give them to the Federal officers?

The Witness: Would you mind repeating that question?

Mr. Roseman: Read it, please.

(Question read.)

A. Well, he did instruct Mr. Broussard to give me the policy slips, as I related a few moments ago.

Q. Because that is what you were looking for, isn't that right? A. That's right.

Q. He never said "Those are my policy slips," did he? A. He pointed to the scale.

Q. After he spoke to Mr. Broussard, isn't that right? A. At the same time.

* * * * *

(176) Mr. Leisure: No. There has been testimony that meat was sold, Judge. I am not saying there was not a butcher shop there. In fact, the law is clear that a man can be conducting a butcher shop and a policy operation at the same time.

* * * * *

(178) *By Mr. Roseman:*

Q. At any time prior to today, have you seen any invoices regarding the purchase of meat by this defendant for the year 1953? A. I did, sir.

Q. Where did you see them? A. On the premises.

Q. Did you examine them? A. I looked at a number of them, sir.

Q. Did they show purchases of a considerable amount of meat? A. They did, sir.

Q. Do you know what quantities were represented or what the purchase price was, Mr. Lemler? A. I can't offhand say, no.

Q. Can you give us an approximation? A. I can't.

Q. Was it a considerable amount of money? A. I imagine it ran into some money, yes, sir.

* * * * *

(179) Q. Mr. Lemler, I believe you testified this afternoon that at or about the time that Mr. Apuzzo spoke to Broussard he pointed to the scale. A. That's right.

Q. Is that after Broussard had told Apuzzo that the slips were in the scale? A. Well, I don't know if Mr. Broussard ever said a word to him. He didn't in my presence.

Q. Do I understand your testimony, Mr. Lemler, that Broussard did or did not talk to Mr. Apuzzo (180) prior to the time that you say that Mr. Apuzzo pointed to the scale? A. They didn't speak between them in the presence of some agent. I feel confident in saying that. Certainly not in my presence.

* * * * *

(181) Q. Is that the only one you were looking at? A. I had the entire area under surveillance, mentally— or rather—

Q. You didn't see what was behind you, did you? A. Well, I was up against the wall. There couldn't be anything behind me.

Q. There was nothing behind you? A. No, nothing. Perhaps a shelf of some sort.

Q. So that the jury will understand, how far was Mr. Apuzzo from you when your back was against this wall? A. Possibly a foot or so.

Q. A foot? A. Possibly.

Q. Wasn't it behind the counter? A. No. He was right in front of me, behind the counter. We were both behind the counter.

Q. I see. And Mr. Broussard was also behind the counter? A. That's right.

Q. Some few feet down? A. That's right.

Q. Where was the scale? A. Right directly in front of Mr. Broussard, and perhaps 3 feet from us.

Q. Mr. Broussard had his back to the scale or was facing the scale? A. I think he was facing it.

(182) Q. You think he was facing it? A. Yes.

Q. Did he point to the scale? A. Mr.—

Q. Did Broussard point to the scale? A. No.

Q. Did he say the slips were there? A. No.

Q. Did Apuzzo point— A. He said, "Give the fellow the slips." He was pointing right to the scale. I was right there.

Q. Did he say there were slips in the scale? A. He said—

Q. Did he say there were slips in the scale? Yes or no, Mr. Lemler. A. No, sir.

Q. And you were saying he pointed, with no words? A. With words.

Q. What were those words, again? A. "Give this fellow the slips." "Give this guy the slips"—to be exact.

Q. Meaning you? A. That's right.

Q. Didn't you tell this jury this afternoon that Mr. Apuzzo said he didn't know about any slips in the store? Did you say that? A. That's right.

Q. Did you say that? A. That's right.

Q. I think you said it three or four times? A. Possibly.

(183) Q. But he pointed; is that it? A. Pointed and directed Mr. Broussard to give me the slips.

Q. To give you fellows the slips? He said, "Give him the slips"?

Mr. Leisure: Your Honor, I am going to object to this. I think this is pretty clear, and I don't see any conflict. I think he is going over it unnecessarily.

Mr. Roseman: I am not pointing out any conflict. I am attacking the credibility of the witness, your Honor. I think this is the nub of the entire case.

The Court: You think you can attack the credibility of the witness by going over and over again what was said, always saying something different from what the witness said? Is that it?

Mr. Roseman: In a way, because there has been conflict with Mr. Guthrie's testimony.

The Court: There certainly has to be a limit to it. We cannot go on forever

Mr. Roseman: All right, Judge. I shall try and wind it up.

Q. You just said it was a direction, not a request—A. Yes.

(184) Q. It was more or less like an order? A. I say, yes.

Q. And that was after you had questioned Mr. Apuzzo and had informed him that you were looking for slips; is that right? A. That's right.

* * * * *

(185) Q. Did you ever take a written statement from Mr. Apuzzo? A. I didn't.

* * * * *

(187-188) VINCENT J. GIANATASIO, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

* * * * *

(192) Q. Mr. Gianatasio, was there a conversation with regard to policy slips after you came out of the back room? A. Yes. Special Investigator Lemler asked Mr. Apuzzo, after he had opened the safe, he said to Mr. Apuzzo, "Where are the policy slips?"

So I heard Mr. Apuzzo say to Ernest Broussard, who was behind the counter, "Ernie, give him the policy slips in the bottom of the scale," pointing to the scale.

Q. What happened then? A. I saw Broussard walk over to the scale, lift (193) up the top, reach down into the scale and hand Special Investigator Lemler a large batch of policy slips.

* * * * *

(194) *Cross Examination by Mr. Roseman:*

* * * * *

(202) Q. Did he tell you how long he was a butcher? A. A long time. I don't recall the number of years.

Q. 15, 20 years? A. A long time, yes.

* * * * *

(207) Q. Did you then have a conversation with the defendant? A. Yes. I—

Q. In the rear? A. In the rear of the store. I got a piece of paper—

Q. What did you say to him and what did he say to you? A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx address. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before.

Mr. Roseman: At this time, your Honor—

The Witness: You wanted to know what I (208) asked him.

Mr. Roseman: All right.

The Court: At this time what?

Mr. Roseman: I don't want the witness to just keep answering. I would rather ask the questions.

The Court: You asked him what the conversation was. I didn't know that he had finished.

Q. Did you tell Mr. Lemler—

The Court: Had you finished telling about the conversation?

The Witness: No, sir.

Q. Did you tell Mr. Lemler—

The Court: Just a minute. He didn't finish.

A. When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago. He didn't know the exact date.

Mr. Roseman: At this time I object to the testimony and move for a mistrial.

The Court: On what ground?

Mr. Roseman: On the ground that this is prejudicial to the defendant.

* * * * * *

(209) Mr. Roseman: Yes, but that conversation is prejudicial.

The Court: You brought it out.

Mr. Roseman: He asked him what the conversation was and he didn't bring it out.

The Court: Then why did you ask him to repeat it?

Mr. Roseman: I wanted to see if he was telling the truth.

Mr. Leisure: I think the answer was perfectly responsive to the question.

The Court: It was responsive. It don't see how you can control what the witness said in answer to the question.

Mr. Roseman: I didn't open any door.

The Court: You asked him what was said.

Mr. Roseman: I had no idea that was going to be the answer.

Mr. Leisure: May I say to your Honor that when I asked the questions I specifically tied it in with certain incidents. I asked him if there was a conversation with regard to the safe, as I recall it. I asked him if there was a conversation with regard to the scale. Now, this question, as I recall it, (210) was much broader than that. He asked him if he had any conversation at all in the back room with him.

The Court: Yes.

Mr. Leisure: For that reason, the Government's contention is that it is an entirely responsive answer.

Mr. Roseman: May I at this time, your Honor, discuss this point with your Honor since it is 4.30 and I would like to discuss it more fully.

The Court: All right. I will excuse the jury until Monday morning at half-past ten.

You remember what I have said to you about discussing this case and also about keeping an open mind. You haven't heard the end of it yet.

I wish you a very pleasant holiday.

(Jury leaves courtroom.)

The Court: Mr. Reporter, will you please read the question about the conversation.

(Question read.)

Mr. Roseman: May I say this, your Honor, that assume for argument that in this conversation this witness was told that this defendant had ten previous convictions. Is he permitted to bring that out because I asked him what conversation he (211) had?

The Court: I don't know why not, subject to instruction on it.

Mr. Roseman: In all the cases that I have tried, and read and appealed, the hundred of cases, unless I ask specifically that question, a witness is usually told by the District Attorney, "Please don't bring in anything about arrests or convictions in the conversation unless someone asks you."

The Court: How could that possibly be when he is asked a question, after having been sworn to tell the truth, to give the whole truth, he is asked what a conversation is? How could he possibly suppress part of the conversation?

Mr. Roseman: He omits the prejudicial part. The judges in this court have ruled where there are informers, and the informer meets the defendant in jail, the informer, when he gets on the stand, he says, "I didn't meet him in jail. I met him, period," and if I said, "Where did you meet him?" and then he says, "In jail," I asked for it, but not before, in all the cases I have tried.

The Court: What you want to show me, then, (212) is a case which says that where counsel asks for a conversation and the conversation brings out

something which couldn't have been brought out by the prosecution, that the counsel who asked the question is entitled to a mistrial.

Mr. Roseman: That is right, your Honor, and it is prejudicial to the effect that the jury is being told that this man had been arrested before, had been in conflict with the law, and it should not have been told. He didn't tell it on direct testimony.

The Court: How are you going to avoid it when you ask the question?

Mr. Roseman: He omits that portion about the arrest. I am not going to say, "You omitted the portion about the arrest." I am not going to complain. If the defendant doesn't complain, your Honor, what harm—

The Court: It is a very simple matter and you have until Monday morning to show me a case.

Mr. Roseman: All right, your Honor. At this time I renew my motion for a mistrial and the declaration of a mistrial and the withdrawal of a juror on the ground that the prejudicial statement (213) contained in a conversation with a tax enforcement official should have be omitted, that the defense counsel didn't do anything but ask the same question that the prosecutor did saying, "What conversation?" And that should have been omitted.

The Court: We might as well settle that because I don't think that is true. I think that in every case the prosecutor did limit himself to a subject.

Mr. Roseman: I did, too conversation pertaining—not about arrests and convictions. I didn't ask him about that.

The Court: I don't know why you didn't if you asked for the whole conversation. The conversation was about arrests and convictions.

Mr. Roseman: I respectfully differ with your Honor. I know the other judges in this court have instructed—

The Court: All you have to do is show me a case Monday morning.

Mr. Roseman: May I also ask your Honor, since I can't get to the judges, if possible that I know. Judge McGohey had a case where I was involved (214) and where the informer was on the witness stand, he met the defendant in jail, Judge McGohey declared a mistrial of his own order where the informer said, "I met him in jail," and he declared a mistrial. Now, he could have said, "I met him, period."

The Court: In response to whose question was that?

Mr. Roseman: I am not sure whether it was the prosecutor's or the defense counsel.

The Court: That would make a lot of difference.

Mr. Roseman: But that happened. I don't see why a defendant should be penalized where defense counsel is simply asking a question what is the conversation that this witness, who has testified in courts knows that it is prejudicial to bring out any arrests or convictions.

The Court: I cannot assume he knows anything of the kind.

Mr. Roseman: He can be questioned now whether he knows that that is not permissible.

The Court: That would not make any difference. He was asked to give the conversation. (215) and he did.

Mr. Leisure: The Government's position is that many, many responses to questions on cross examination may be prejudicial and that in this in-

stance the answer was completely responsive to the question and that regardless of whether or not the Government framed its questions in such a way as to pinpoint, Mr. Roseman is correct when he says a witness should not respond prejudicially in response to Government questions, but I am sure that that rule does not apply on cross examination.

Mr. Roseman: But this is not a case where I opened the door, that I pointed out to your Honor where the answer is, "I met him," and I said, "Where did you meet him?"

The Court: All the oratory in the world won't have the slightest effect. It is the case I want to see. I want to know what the law is.

Mr. Roseman: I will try in my utmost research ability to produce such a matter before you. I am only pointing out, your Honor, that in all the cases I have tried—

The Court: All you need to point out is something in a book.

(215a) Monday morning, 10.30.

(Adjourned to November 14, 1955, at 10.30 a.m.)

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(216) New York, November 14, 1955;
10.30 o'clock a.m.

* * * * *

(The following proceedings took place in the absence of the jury.)

Mr. Roseman: Your Honor, may I proceed?

The Court: Yes, Mr. Roseman. You were going to look up some law and let me know what you found.

Mr. Roseman: Well, if your Honor please, I spent all day Friday with my young man and I was able to uncover several cases which throw some light on this subject. However, I must say very candidly that eight hours' research failed to uncover one particular case which was exactly on all fours. However, on this fine part of the law there is always something new and some little confusion. I did uncover however, the fact that where the United States Attorney has asked similar questions, or the defense counsel, and the answer by the enforcement officer was a general statement which (217) included an extraneous matter, and caused that to arise, that obviously the Court treated it as error, and in several of the cases I must confess that the Appellate Court said that, "While we regard this seriously we think it was harmless but only because of the overwhelming evidence of guilt."

So that the appellate courts look upon this subject as serious, but in the appellate tribunals the question does not loom as important in view of the other evidence in the case.

Now, I found a case of Howe v. United States, Court of Appeals, 56 Fed. (2d) 305, where the judge said:

"We are unable to agree with the lower court which disregarded this arrest statement," and said that part of the conversation objected to could well have been left out and that it did not help the case any, because the Court I believe or I think even failed to tell the jury that such a statement has no place in the case and that since it did, then the jury should be admonished to disregard it. That was one case I found.

And there is another in the Ninth Circuit, the case of Sang Soon Sur v. The United States, 167 (218) Fed. (2d), 431. There an Internal Revenue agent upon arresting the defendant had received certain answers to their questions and they reduced them to writing, and those statements were introduced and there was objection upon the ground that this was extraneous matter which was received previous to the arrest. And the Court there held that the appellant entered the trial with a presumption of innocence, with a presumption of a good repitatfon unless he took the witness stand, and that such an issue should not arise unless the defendant took the witness stand, and that any such evidence showing the commission of independent crimes prior to the arrest, therefore, could never be justified on the basis that they were relevant. But I believe the Court in that case said that since the evidence was overwhelming it could not be considered a determining factor.

And again in Dressler v. The United States, 112 Fed. (2d), 972, at page 977, the Court there held that it was inconsistent with our traditional conception of fair trial to permit any information to get to a jury which influenced or might influence it in its deliberations in bringing forth a (219) conviction not upon the evidence presented but rather on the fact that he might have been in skirmish with the law in some other matter.

Also in Shelton v. The United States, 169 Fed. (2d), 665, the United States marshals had arrested the defendant, but interrogating the United States marshals, defense counsel had brought prejudicial matters out, that there were statements of other offenses, but in that case I should like to call to your

Honor's attention the procedure that the trial court used in that case.

The Court: Yes.

Mr. Roseman: In that case the trial court sensing possible prejudicial error said in effect to the defense counsel: "Just a minute. You had better ask specific questions."

And defense counsel did not heed the Court's advice so that the improper response was actually for by defense counsel.

And what they said there also is that the error was harmless only because of the extenuating circumstances and the heavy evidence against the defendant.

I point out in this case at bar, if my (220) recollection is correct, that when he started to say arrest I broke in immediately and—.

The Court: Well, let us have the record read.

Mr. Roseman: Yes, your Honor.

(Thereupon the record was read as follows.)

"Q. What did you say to him and what did he say to you? A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx address. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before.

"Mr. Roseman: At this time, your Honor—

"The Witness: You wanted to know what I asked him.

"Mr. Roseman: All right.

"The Court: At this time what?

"Mr. Roseman: I don't want the witness to just keep answering. I would rather ask the questions.

"The Court: You asked him what the conversation was. I didn't know that he had finished.

"Q. Did you tell Mr. Lemler—

(221) "The Court: Had you finished telling about the conversation?

"The Witness: No, sir.

"Q. Did you tell Mr. Lemler—

"The Court: Just a minute. He didn't finish.

"A. When I asked him if he was arrested before, he told me had been arrested for policy about 13 years ago. He didn't know the exact date.

"Mr. Roseman: At this time I object to the testimony and move for a mistrial."

The Court: All right.

Mr. Roseman: Now, your Honor, I feel at this point the jury at least should have been told that it had no place, as I was attempting to cut in, and and having been apprised of what was happening initially in the trial I tried to stop him, as the record indicates.

The Court: There is not any doubt about that. And if your motion for a mistrial is not granted I will instruct the jury that you attempted to keep this out and that it was brought in on the Court's insistence that the whole conversation should be given. And I would instruct the jury that the (222) fact of a person's arrest has no bearing whatsoever on the question of his guilt, because just as I instructed them at the start, a man is presumed to be innocent, and the fact that he was arrested does not indicate that he was guilty.

Mr. Roseman: I just wanted to point out your Honor, the operation of my mind so that it will be clear to your Honor, too.

The Court: Yes.

Colloquy

Mr. Roseman: On cross examination, if your Honor recalls, I went in very hastily into questions of what did the defendant say to you and what did you say to the defendant. That question was addressed to Lemley, and this was in a small room 12 x 15, which would be heard, or it could be heard what everybody else said, and then for the first time after Mr. Lemley had been examined and Gianatasio was asked what did you say when you interviewed the defendant and what did the defendant say to you, he did not say anything about these arrests.

So, your Honor, you could see that I felt safe after there were these three cross examinations and the testimony having come in from three witnesses, that such statements which had never been mentioned (223) before was not going to come in, so that it was brought in through the back door, that is to say.

The Court: I am not disposed to put great weight on the questions which resulted in the bringing forth of this answer, but what I am interested in is whether, no matter how it happened, there can be a fair trial. However, I will hear you on that, Mr. Leisure.

Mr. Leisure: The Government's position is this: Since this was cross examination and, secondly, since the answer was responsive to the question, it was not volunteered or beyond the scope of the question, that the defendant must be bound by it.

The art of cross examination is fraught with difficulty as is well known among the bar and it can be a dangerous area, and the only alternative to what happened here that I can see is that the Government should be required to instruct the witness

not to testify truthfully in that area if he is asked.

Now, I always make it a practice to instruct my witnesses not to volunteer anything that you do not need to on cross and to be responsive.

(224) I think a reading of the record indicates that this was entirely responsive answer. This was not putting a dagger, so to speak, into the defendant's back on the part of the witness at all. His first answer was yes when he was asked if he was interviewed.

I found one case in the area where Mr. Roseman indicated it was hard to find exactly a case in point, and that is quite the fact, but this is a conspiracy case, Metcalf v. The United States, 195 Fed. (2d) 213, and that was decided in 1952 in the Sixth Circuit.

And the question there was whether or not certain evidence was admissible against the two conspirators named Metcalf and Mullins. And the counsel who represented those two defendants on cross examination of the witness brought out a great deal of testimony which the Court later held to be admissible, and the Court said:

"However, the statements of Macom and Cook were read at the request of counsel for Metcalf and Mullins upon cross examination by him of Agent Staab, probably in the hope of bringing to the attention of the jury some evidence therein (225) favorable to the cause of his clients as well as what was unfavorable. The statements of Macom and Cook were thus made competent as to appellants Metcalf and Mullins."

And at a later point, at page 217, the Court said:

"There is no obligation on the Court to prevent

cross examination to which none of the parties objected."

The Government's position is that the door was opened entirely by defense counsel and the only way this could have been avoided as far as I can see it, would be to have a witness instructed during a course of a trial there were certain conversations that he should not testify to no matter how hard he was pressed, which I think is an undesirable result.

The Court: Perhaps there is no way of avoiding it and the only cure for it may be to start again. I certainly do not feel that I should disregard the matter as a sort of punishment to counsel by reason of his asking the question which called for this type of answer even if he ought to have realized that it might bring it out. It is obvious that he did not do it in an effort to get (226) error in the record because he attempted to prevent the witness from going on and testifying.

I am wondering whether I ought to reserve decision on this and pass on it on a motion to set aside the verdict if there should be a verdict of guilty.

Do you think that would be a sensible thing to do, Mr. Roseman?

Mr. Roseman: Yes, your Honor, under the circumstances not only sensible but I think eminently fair.

The Court: All right, then, that is what I will do. I will reserve decision, but I think I should instruct the jury that it ought not to have been brought in and that they are to disregard it, and that under our law the fact of an arrest is no evidence of guilt.

Mr. Leisure: The Government would certainly urge that also, your Honor.

The Court: All right. That is what we will do. Please call the jury in.

(At this point the proceedings in the absence of the jury terminated and the following proceedings took place in the presence of the jury.)

(227) The Court: Good morning, ladies and gentlemen. I am sorry that we had to keep you waiting. All I can do is to assure you that we have not been idle while you have been in there, which probably even in this short period may have seemed to you a lot of time.

However, at the close of the last session there was a witness on the stand who was asked a question by counsel for the defense and in answering the question said something about the previous arrest of this defendant.

That ought not to have been brought out. Counsel in asking the question did not expect that it would be brought out, did not try to bring it out, and it was only on my insistence, and I wrongly insisted on it, that he told the whole story that was brought out.

Now, the reason that the law does not permit testimony with respect to previous arrests is that an arrest means absolutely nothing; just as I told you at the beginning of the case, a man is presumed to be innocent until he is found guilty, and the arrest is nothing more than the information that I was talking to you about, so that it has no bearing on the question (228) in the eyes of the law. And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out.

Proceed, please, Mr. Roseman.

Mr. Roseman: Yes, sir.

VINCENT J. GIANATASIO, resumed.

Cross Examination by Mr. Roseman (Continued):

* * * * *

(233) Q. Did you in investigating the premises at 363 Lenox Avenue on August 5 see any invoices for the purchase of meat? A. Yes, sir.

Q. Did you peruse those invoices with your partner, Mr. Lemler? A. Yes, sir.

Q. About how many invoices did you see? A. All, offhand, I couldn't say about how many there were, but there were maybe about a hundred, maybe less, maybe more.

Q. A hundred invoices? A. About that.

Q. And the latest invoice was June 1953? A. Some date in June. That is to the best of my recollection.

* * * * *

(238) Q. What did the defendant say? A. The defendant said, "Ernie," pointing to the defendant Broussard and to the safe and the scale, he says, "Give them the slips from the scale."

Q. Give them the slips? A. From the scale.

Q. From the scale? A. Yes.

(239) Q. Did you tell that to the jury on Thursday? A. Well, I told them——

Q. "Give them the slips from the scale"? A. It was either in the scale, or from the scale, I just don't recall exactly.

Q. You don't recall whether it was "in" or "from"? A. Or "from." I don't recall exactly.

Q. Didn't you tell this jury on Thursday, "Ernie, give them the slips in the bottom of the scale"?

Mr. Leisure: I object to that question, your Honor, this type of cross examination.

The Court: Objection overruled.

Q. Did you say that to the jury on Thursday? A. I may have. I may have said that. I don't—

Q. In fact, if the stenographer read it back you would say you said it? A. Yes, sir, I would.

Q. Now, what was it, at the bottom of the scale, from the scale, in the scale, or what was it, Mr. Gianatasio? A. Well, the slips were inside the scale.

Q. I didn't ask you that, did I? I said what was said. I didn't ask you where the slips were. I said what did you say that the defendant said? (240) A. Well, whatever I have testified to, I testified to the best of my recollection.

Q. That is right, and what were the words that were used, "in the scale," "from the scale," or "at the bottom of the scale"? A. It may have been "in the scale," "from the scale," or "in the bottoms of the scale." I don't—I don't remember the exact words. It could have been either.

Q. It does not make any difference to you, does it? A. No, sir, it does not.

Q. Any of the words, that does not make any difference to you, does it? A. As best I can recall, I try to testify.

Q. Don't you think it is important that you remember the words that were said by this defendant, Mr. Gianatasio? A. Yes, sir, I think so.

* * * * * *

(297) Mr. Leisure: Apparently.

The Court: One wilful omission and the

other wilful evasion. That is what the Justice seems to say in this case. It sounds like saying what your opponent says, and that is when you charge a conspiracy you by that very fact charge that there is a wilful evasion rather than omission, because two people could not in logic get together and say "We agree to omit."

* * * * *

(298) Mr. Leisure: It is hard for me to draw the distinction from conspiring and evading and conspiring (299) and omitting. It seems to me—

The Court: I don't think there is any.

* * * * *

(320) ERNEST BROUSSARD, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Roseman:

Q. Mr. Broussard, are you under subpoena here by the defendant? A. Yes, I am.

Q. Do you know the defendant in this case? A. Yes, I do.

Q. And were you employed by the defendant in 1953 as a butcher's helper? A. Yes, I was.

Q. At the premises, 363 Lenox Avenue, in the Borough of Manhattan? A. Yes.

Q. And for how long had you been so employed by this defendant? A. Oh, all together about eight years.

(321) Q. As a butcher's helper? A. Yes.

Q. That is at the store, 363 Lenox Avenue, Borough of Manhattan? A. Yes.

Q. And at his other store previously? A. Yes.

Q. 387 Lenox Avenue? A. Right.

* * * * *

Q. Now, Mr. Broussard, going back to August 5, 1953,

at the premises, 363 Lenox Avenue, did you see some men rush into the store? A. Yes, I did.

Q. What were they doing? A. Well, a couple of men rushed in and they had pistols in their hands.

Q. A couple of men rushed in and they had pistols in their hands? (322) A. Yes. I thought it was a stick-up or something.

* * * * * *

(323) Q. There were eventually policy slips found in the scale behind the counter? A. Yes.

Q. And did you find them? A. I give it to them.

Q. Prior to that what happened, Mr. Broussard? Will you please tell the jury. A. Well, Mr. Apuzzo called me from behind the counter and he said, "These people say there are (324) policy slips in there. If you know anything about it please give it to them." He wants to cooperate with the people.

Q. Did he point to any scale? A. No.

The Court: Please do not lead.

Q. What did you do after the defendant told you that? A. I walked back to the counter and told him, "Here are the slips."

Q. You secured the slips? A. Yes.

Q. Were those slips yours? A. Yes, some of them.

Q. Had you been taking policy slips? A. I had.

Q. For how long? A. About two months.

Q. Did you tell Mr. Apuzzo that you had been taking policy slips? A. No.

Q. Did he know anything about it? A. No, he did not.

* * * * * *

(326) Q. Now, you admit now that you were accepting wagers on the premises in August of 1953, is that correct? A. Yes, sir.

* * * * * *

(327) Q. Did you use the white pads back there in connection with the wagering operations? A. No.

Q. Did you use the large number of pencils (328) back there in connection with the wagering operations? A. No.

Q. Did you use the various money wrappers that ran from one cent up to a dollar in connection with the wagering operations? A. No, we always used this for the restaurant.

Q. Was there a safe inside the store at the time you worked there in August 1953? A. Yes.

Q. Did you use that safe yourself? A. Occasionally.

* * * * *

(335) ARTHUR ISIDORI, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Roseman:

* * * * *

(336) Q. Is there a safe in the premises, 363 Lenox Avenue? A. Yes.

Q. Do you have the combination of that safe? A. Yes, sir.

Q. And for how long have you had that combination? (337) A. Since the safe was there.

Q. And how long is that? A. Well, it is six years, about, since I had been working there.

Q. Who else has the combination of that safe besides yourself? A. Mr. Apuzzo, and also William Duday.

Q. Now, Mr. Isidori, do you recall August 5, 1953? A. I do.

Q. Were you physically at the premises, 363 Lenox Avenue, on that day? A.

Q. Where were you? A. At home.

Q. And had you been on vacation? A. Two weeks.

Q. For how long? A. That was my second week.

Q. On vacation? A. On vacation.

Q. That means the week in which August 5, 1953 occurred was your second week of your vacation? A. That is correct.

Q. And the one prior to that you were also on vacation? A. That is correct.

Q. Do you recall what happened that day at your home? A. Well, I was home and—

* * * * *

Q. You got a telephone call? A. Yes.

Q. From whom? A. From Mr. Apuzzo.

Q. And what did he say to you and what did you say to him? A. Well, he asked me for the combination of the safe. I says, "What for? You know it." Well, he sounded very excited. He said, "There are a lot of men in here, agents." * * * I gave him the combination over the phone * * *"

* * * * *

(404) Mr. Roseman: May I move to set aside the verdict, your Honor, as against the weight of the evidence, contrary to law and the facts, and I also renew my motion upon which your Honor reserved decision, on my motion for a mistrial because of the fact that prejudicial matter was given to the jury, and we would not know the effect of such devastation unless we prodded the jurors' minds, and I renew that motion.

The Court: What do you say to that, Mr. Leisure?

Mr. Leisure: I will repeat, your Honor, what I argued at the time the motion was first brought on, and that is that the prejudicial matter was brought out on cross examination as a result of a question (405) put by the defense counsel to which the answer was completely responsive.

I think that any error that there was was certainly cured by the Court's charge to the jury despite the fact that it was a responsive answer to a question on cross examination, that the jury should

not consider the evidence of the prior conviction in determining whether or not the defendant was guilty of the charges before the Court in this case.

The Court: You mean the evidence of previous arrest?

Mr. Leisure: That is correct.

The Court: I am not inclined to put much weight on the way this thing got into the case. I think the real question is what, if any, damage it did.

The cases that you gentlemen found on the subject seemed to indicate that it was not a hard and fast rule that if evidence of a previous arrest gets into the case it is ground for a mistrial, and that makes it necessary to weigh the effect of what was said in the light of all the circumstances of the case.

I think that two of the cases which you found (406) said that it would be disregarded in view of the fact that the evidence of guilt was so clear.

Do you think, Mr. Leisure, that you could say that really could be applied here?

Mr. Leisure: I would think so, your Honor, and beyond that I think there is the possibility that that might have been an arrest as in the present case, or where there were prior similar acts, or where these arrests were not connected with the particular case.

The Court: I do not understand your statement, Mr. Leisure.

Mr. Leisure: In other words, the charge here that he was in the busines of accepting wagers and did not pay the taxes. The arrest indicated that it was a State crime that had been committed. In this case the evidence was strictly to an arrest, not a conviction, but that he had been arrested for the

very type of activity. So I would urge not only what your Honor says that the evidence in the case beyond the evidence of prior arrest is very conclusive of the defendant's guilt, but beyond that it might not have been error if the Government put it in on prior similar acts, although that question is not before the (407) Court.

The Court: I am inclined to think that under all the circumstances of this case it did no harm, and I will deny your motion.

Order of Noonan, *U.S.D.J.*

(470)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Inf. # C 145-283

[SAME TITLE]

The defendant Salvatore Apuzzo, above named, having moved by notice of motion dated November 24, 1954 for an order directing the return of certain property, to wit, books, papers, records, currency, etc., belonging to the defendant, schedules of all of which are annexed hereto and which on the 5th day of August, 1953 at premises 363 Lenox Avenue in the Borough of Manhattan, City and State of New York in this District was unlawfully seized and taken by agents, special agents or investigators of the Bureau of Internal Revenue and that such property be suppressed as evidence against him in this and or any other criminal proceeding and or that a hearing be had on the allegations contained herein, and for such other and further relief as to the Court may seem just and proper in the premises, and said motion having regularly come on to be heard and after reading and filing the defendant's notice of motion dated November 24, 1954 and affidavit of Salvatore Apuzzo, duly sworn to the 25th day of November, 1954, in support thereof, and the affidavit of Judson A. Parsons, Jr., Assistant U. S. Attorney, duly verified the 13th day of December 1954, in opposition thereto, and after hearing Arnold D. Rosenman, Esq., Attorney for the defendant Salvatore Apuzzo in support thereof, and (471) Judson A. Parsons, Jr., Assistant U. S. Attorney, in oppo-

sition thereto, and due deliberation having been had, and having filed its written opinion dated December 22, 1954; it is

ORDERED that the motion of the defendant Salvatore Apuzzo be and the same is hereby denied.

Dated: New York, New York
May 23, 1955.

NOONAN,
U. S. D. J.

Order of Leibell, *U.S.D.J.*

(472)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Inf. # C 145–283

[SAME TITLE]

The defendant, Salvatore Apuzzo, above named, having moved by notice of motion dated November 24, 1954 for an order directing the United States Attorney to serve and file a bill of particulars as enumerated therein, and for such other and further relief as to the Court may seem just and proper in the premises, and said motion having regularly come on to be heard, and after reading and filing the defendant's notice of motion dated February 4, 1955 and affidavit of Arnold D. Roseman, duly sworn to the 4th day of February, 1954, the Information filed October 27, 1954, and memorandum of law in support thereof, and the affidavit of Judson A. Parson, Jr., Assistant U. S. Attorney, duly verified the 4th day of May 1955, and memorandum of law in opposition thereto, and after hearing Arnold D. Roseman, Esq., Attorney for the defendant Salvatore Apuzzo in support thereof, and Judson A. Parsons, Jr., Assistant U. S. Attorney, in opposition thereto, and due deliberation having been had, and having filed its written opinion dated May 10, 1955, it is

ORDERED that the motion of the defendant Salvatore Apuzzo be and the same is hereby denied.

Dated: New York, New York
May 31, 1955

VINCENT L. LEIBELL
U. S. D. J.

Judgment and Commitment

(477)

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. C 145/283

[SAME TITLE]

On this 13th day of December, 1955, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense, of while engaged in the business of accepting wagers in the County of New York, New York, did unlawfully, wilfully and knowingly fail to pay the special tax imposed by law and fail to register with the Director of Internal Revenue for the Upper Manhattan District of New York, at New York, New York

T 26 Sec. 2707(B), 3277, 3290, 3292, 3294, 3291(a) USC
as charged in two counts

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of sixty days and fined $3,000.00 on count one. Defendant to stand committed until fine is paid or otherwise discharged according to law.

Imposition of sentence is saspended on count two. Probation for Four years, to begin after service of sentence on count one, subject to the standing probation order of this Court.

Bail fixed in the sum of $1500. pending appeal. Defendant paroled to give bail.

It is ordered that the clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

E. J. Dimock
United States District Judge

Order of Walsh, *U.S.D.J.*

(511)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Information No. C 147–278

[SAME TITLE]

The defendant Salvatore Apuzzo, above named, having moved by notice of motion dated June 24, 1955 for an order dismissing said Information and, further, directing the return of certain property and for suppression of certain evidence against the defendant Apuzzo and or that a hearing be had, and further, directing the United States Attorney to serve and file a bill of particulars, and for such other and further relief as to the Court may seem just and proper in the premises; and said motion having regularly come to be heard, and after reading and filing the defendant's notice of motion dated June 24, 1955 and the affidavit of Arnold D. Roseman, duly sworn to the 24th day of June 1955, the Information No. 147–278, filed June 16, 1955, and the affidavit of Judson A. Parsons, Jr., assistant United States Attorney, duly verified the 30th day of June 1955, in opposition thereto, and after hearing Arnold D. Roseman, Esq., Attorney for Defendant Salvatore Apuzzo in support thereof, and Judson A. Parsons, Jr., Assistant U. S. Attorney, in opposition thereto, and due deliberation having been had, it is

ORDERED that the motion of the defendant Salvatore Apuzzo to dismiss the information herein be and the same is hereby denied, and it is

(512) ORDERED that the motion of the defendant Salvatore Apuzzo to suppress the evidence herein and/or that a hearing be had, be and the same is hereby denied, and it is further

ORDERED that the motion of the defendant Salvatore Apuzzo for a bill of particulars herein be and the same is hereby denied.

Dated: New York, New York
July 5, 1955

LAWRENCE E. WALSH
U. S. D. J.

Judgment and Order of Probation

(516)

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. C 147/278

[SAME TITLE]

On this 13th day of December, 1955, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of T 18 Sec. 371 USC—Conspiracy to unlawfully, wilfully and knowingly engage in a business of accepting wagers in the County of New York, New York and fail to register with the director of Internal Revenue for the Upper Manhattan District of New York

as charged

and the Court having asked the defendant whether he has anything to say why Judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the imposition of sentence is suspended.

Probation for four years to begin after service of sentence on count one of Information C 145/283, subject to the standing probation order of this Court.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before this Court for a violation of the Court's orders.

IT IS FURTHER ORDERED that the clerk deliver two certified copies of this Judgment and Order to the probation officer of this Court, one of which shall be delivered to the defendant by the probation officer.

E. J. DIMOCK
United States District Judge

WILLIAM V. CONNELL
Clerk

Notice of Appeal

(480)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 145-283

C 147-278

[SAME TITLE]

1. *Name and address of Appellant:*

SALVATORE APUZZO
160 Ferndale Road
Greenburgh, New York

2. *Name and address of Appellant's attorney:*

ARNOLD D. ROSEMAN
120 Broadway
New York 5, New York

OFFENSE: Appellant was charged in Information # C 145-283 with the crimes of engaging in the business of accepting wagers, individually and as a co-partnership with two other defendants during August, 1953 and wilfully failing to pay the special tax (First Count), and wilfully failing to register with the Director of Internal Revenue for Manhattan District (Second Count), (Title 26, U. S. Code, Secs. 2707(b), 3277, 3290, 3291(a), 3292 and 3294). In Information # C 147-278, appellant was charged with the crime of conspiracy, with the two same defendants, to violate said provisions of law in that appellant and these two other defendants engaged in the business of accepting wagers individually and as a co-partnership and failed

to pay the special tax and failed to register (Title 18, U. S. C. Sec. 371).

3. *Judgment of Conviction*

Appellant was found guilty by a jury on November 15, 1955 of the charges contained in the two informations and he was sentenced on December 13, 1955 by Hon. Edward J. Dimock, United States District Judge as follows:

On Inf. # C 145-283 (a) First Count—60 days at a penal institution to be designated by the Attorney General and fined the sum of $3,000 to stand committed until the fine was paid; (b) Second Count imposition of sentence suspended and placed on probation for a period of 4 years after sentence on First Count.

(481) *On Inf. # C 147-278*—Imposition of sentence suspended and placed on probation for a period of 4 years after sentence on First Count of C 145-283.

4. Appellant is at liberty on bail in the sum of $1,500, continued by Hon. Edward J. Dimock, U. S. District Judge pending appeal from the judgment of conviction.

5. The above-named defendant-appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated judgment and from those orders made before trial denying defendant's applications for suppression of evidence unlawfully seized and for a hearing dated May 23, 1955 (Noonan, J); for a bill of particulars dated May 31, 1955 (Leibell, J) and for a dismissal of the information, suppression of evidence and a hearing and for a bill of particulars

relative to # C 147-278 dated July 5, 1955 (Walsh, J.); and from the orders denying appellant's motions for a judgment of acquittal, dismissal of informations, mistrial and for a new trial.

Dated: New York, New York
December 13, 1955

Arnold D. Roseman
Attorney for Appellant
Office & P. O. Address
120 Broadway
New York 5, N. Y.

Office Supreme Court, U.S.
FILED
JUL 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 282

SALVATORE APUZZO,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT S. BUTTLES
Attorney for Petitioner
120 Broadway
New York 5, N. Y.

GEORGE M. LEHR.
ARNOLD D. ROSEMAN
HARRY SILVER
On the Petition

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IN THE

Supreme Court of the United States

October Term, 1956

No.

SALVATORE APUZZO,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Salvatore Apuzzo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

Opinions Below

There was no opinion in the United States District Court, Southern District of New York (Dimock, J.) upon appellant's conviction. An opinion by District Judge Noonan, upon petitioner's pretrial motion challenging the validity of the issuance of search warrant for the search and seizure of records, appears at pages 56-57 of Appendix C, *infra*. In the Court of Appeals, upon rehearing by the Court *en banc*, there were three separate opinions—not yet

officially reported—all for affirmance of petitioner's conviction. The opinion of Chief Judge Clark, concurred in by Judge Medina, is printed at pages 30-45 of Appendix A, *infra*. The separate concurring opinions of Judges Hincks and Waterman are printed at pages 45 to 54, Appendix A, *infra*.[1] Judge Lumbard had disqualified himself.

Petitioner's application for rehearing before six judges, following the *en banc* determination by four judges, was denied, without opinion (p. 55, Appendix B, *infra*).

Statement of Jurisdiction

The Court of Appeals affirmed the conviction of the petitioner by judgment dated and entered May 28, 1957.

Petitioner duly filed a petition for rehearing *en banc* before six judges (Subd. c, Sec. 6, Title 28, U. S. Code; cf. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U. S. 247), which was denied by order of the Court of Appeals dated and entered on June 18, 1957 (p. 55, Appendix B, *infra*). This petition is filed within thirty days thereafter.

The mandate of the Court of Appeals has been stayed by order of the Court of Appeals dated June 18, 1957

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[1] "Judge Frank heard the argument of this case on the original hearing and on the rehearing *en banc* and voted to reverse and remand, preparing supporting memoranda to that effect. He died, however, before this opinion was written." (Footnote, Court of Appeals Opinion, p. 29, *infra*).

Judges Clark, Frank and Waterman comprised the Court of Appeals panel which originally heard the appeal. Judges Frank and Waterman "concurred in a proposed opinion written last term before the hearing *en banc* was decided upon that would have reversed the conviction and remanded for a new trial." (Judge Waterman's opinion, p. 49, *infra*).

pending application for certiorari pursuant to its Rule 28(c) (p. 55, Appendix B, *infra*).

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, and Rule 37(c) of the Rules of Criminal Procedure.

Questions Presented

1. (a) Where an experienced federal law enforcement officer's recitation of the substance of his conversation with a defendant on direct examination, in response to the prosecutor's broad, generic interrogation on the subject, is devoid of all reference to incompetent and prejudicial matter, is defendant's counsel precluded via waiver and estoppel from objecting to the officer's injection of incompetent, prejudicial testimony relating to defendant's prior arrest on cross-examination in response to a question no different from the prosecutor's?

(b) Does not the injection of necessarily indelible, incompetent, and prejudicial testimony by an experienced federal law enforcement officer divulging to the jury that a defendant had been arrested on a prior occasion and charged with a crime which is an essential element of the prosecution—where defendant had not testified at the trial—permeate the trial with a degree of unfairness and make it an unfair trial, which this court in its supervisory role should discountenance under the doctrine of *McNabb* v. *United States*, 318 U. S. 332 by invalidating a conviction had under such circumstances?

2. May a search warrant validly be issued by a federal court directing search for and seizure of records purport-

ing to connect a person with the business of receiving wagers—admittedly a state but not a federal crime—and then, may evidence thus obtained be utilized by the Government in a prosecution for failure to pay the wagering tax?

Reasons for Granting the Writ

1. This Court in *McNabb* v. *United States*, 318 U. S. 332, has charged itself with "the duty of establishing and maintaining civilized standards of procedure and evidence" (p. 340) and the formulation of "rules of evidence to be applied in federal criminal prosecutions" (p. 341). The instant case uniquely appeals to the dual burdens which this Court has assumed.

The introduction at the trial of evidence of petitioner's prior arrest under the circumstances which brought about its disclosure evoked four different interpretations from the five members of the bench of the Court of Appeals of the Second Circuit who heard the appeal. Judges Clark and Medina held that the admission of the evidence was not error. Judge Hincks held that it was error but that it was not prejudicial because the proof of petitioner's guilt was so overwhelming. Judge Waterman opined that the admission of the evidence of the prior arrest was error and prejudicial but that it was cured by the trial court's instructions to the jury. Finally, Judge Frank concluded that the admission of the evidence was erroneous and fatally prejudicial in spite of Judge Dimock's words to the jury. The results of this multiplicity of judicial opinions are that petitioner is faced with the loss of his liberty and the federal courts are without guide as to the "stand-

ards of procedure and evidence" to be followed and the "rules of evidence to be applied" in this important aspect of criminal prosecutions.

A final and conclusive determination of the criteria to be observed in cases such as this should be made by this Court.

2. This case, in addition, presents the question of the validity, under the Fourth and Fifth Amendments of the Constitution of the United States and Rule 41(b)(2) of the Federal Rules of Criminal Procedure, of a search and seizure, the fruits of which were the backbone of the Government's case. The preservation of petitioner's constitutional rights and the sound administration of criminal justice require a determination by this Court whether a search warrant may be validly issued under the circumstances of the instant case.

Statement of the Case

The petitioner was tried on two informations: Information No. C 145-283 charging the petitioner in two counts with (a) failure to pay the special tax imposed upon persons engaged in the business of accepting wagers and (b) failure to register to pay the tax; and Information No. C 147-278 charging the petitioner in one count with conspiring with two other individuals to commit those crimes. The statutes violated are Title 26, United States Code, Sections 2707(b), 3277, 3290, 3291(a), 3292 and 3294, and Title 18, United States Code, Section 371 (2, 3).[2]

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[2] Numeral references are to pages in "Appellant's Appendix" in Court of Appeals, unless otherwise noted.

After a trial lasting five court days, the jury on November 15, 1955, returned a verdict of guilty on each of the two counts of Information No. C 145-283, and on the one count of Information No. C 147-278.[3]

The circumstances giving rise to the filing of the charges may be briefly summarized. In the latter part of July, 1953 and early in August, 1953, two Government agents, Goodwin and Fletcher, made or placed "policy" or "number" bets in a butcher shop located at 383 Lenox Avenue, New York City. These wagers were made on various days during a one hour period between 12:30 and 1:30 in the afternoon with either the co-defendants Aaron or Broussard--butchers working behind the meat counter (13-14). *No bets were ever placed or made with appellant, the owner of the shop.* These Agents spent, at most, two, three or four minutes in the store on each occasion and did not see appellant at any time. However, one Agent saw meat being sold (12).

On August 5, 1953, pursuant to a search warrant issued by Hon. Edward Weinfeld, United States District Judge,

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[3] Petitioner was sentenced to 60 days imprisonment and to pay a fine of $3,000. on the first count of Information #C 145-283; on the second count, imposition of sentence was suspended and petitioner was placed on probation for a period of four years after sentence on the first count. On Information #C 147-278 imposition of sentence was suspended and petitioner was placed on probation for a period of four years after sentence on the first count of Information C 145-283 (61-62, 65-66).

Trial was had on both informations without an order of consolidation under Rule 13 of the Federal Rules of Criminal Procedure. The government's application to consolidate for trial—made subsequently to the actual commencement of the trial—was denied by the Trial Court on appellant's objection to the consolidation (pp. 282, 411, 487, Original Record).

Co-defendants Aaron and Broussard pleaded guilty to the substantive counts (Information C 145-283) before trial and their case was severed (2, 3, Original Record).

a raid was made on the butcher shop premises at 363 Lenox Avenue by Treasury Department agents Guthrie, Gianatasio, Lemler and Di Cupua (18-19) of the Alcohol & Tobacco Tax Division (13). These agents entered with guns drawn (27) without notice and went into a back room or office of the store where they found appellant with three other men, none of whom was later arrested. The appellant, at the time, was inspecting ties which an itinerant salesman was offering for sale (21). Appellant was surprised and startled by the raid (pp. 92, 206, Original Record) and at first stated that he was merely visiting the premises. He readily identified himself (21, 26; p. 38, Original Record). The agents searched him and found approximately $1300. in cash on his person (p. 38, Original Record). One of the agents said he knew appellant was the owner of the butcher shop (p. 151, Original Record).

After routine questioning during which appellant stated that he was in the butcher business (29) for 15 or 20 years (35), the agents and appellant proceeded to the front of the store in which were located a meat counter filled with meat (19-20), a safe and a refrigerator. Appellant was asked to open the safe. At first, he said that he did not know or had forgotten the combination (pp. 39, 338, Original Record) or that someone else had the combination (21). When told that it would be necessary to remove the safe from the premises and break it open, appellant opened the safe.

A defense witness, Arthur Isidori, appellant's brother-in-law, who had been in appellant's employ as a butcher for 6 years (54), testified that appellant, in an excited state, telephoned him for the combination (55). This call was either denied or not remembered by the government

agents (29). In the safe, containing several compartments (p. 343, Original Record) with locks (22), were found approximately $10,000 in cash, bank books in the appellant's name, insurance policies belonging to appellant and two envelopes, one containing nine undated policy slips and another containing six undated policy slips (15-17). Other persons had access to this safe (21, 24, 54). All of these items were seized by the Treasury agents and, in addition, they took invoices (31-32) covering purchases of large quantities of meat just prior to the period in question (50), and checks which the butcher shop had cashed for customers (30-31; p. 129, Original Record). Appellant admitted that the cash found in the safe was his and stated that he kept his money there because the Federal Government had impressed liens upon his assets in connection with income tax claims (22) then pending in the U. S. Tax Court (24).

The agents then inquired of all whether there were any policy slips in the store in addition to the ones found in the safe. They testified that appellant pointed to the scale on the counter and told Broussard, who was behind the counter, to "give them the slips." Broussard removed the weighing platform of the scale and the part supporting it. Inside were found approximately 150 policy slips (17, 23, 25-26, 31-34, 35, 50).

Broussard had been waiting on a customer buying meat when the raiding party first entered the premises (53). He said that appellant had instructed him to *give the agents the policy slips if he, Broussard, knew anything about them.* He testified further that appellant knew nothing about policy slips and did not know that Broussard had been accepting policy bets for about two months.

Broussard declared that in response to appellant's request, he went to the scale and gave the Treasury men the policy slips (53). The Government witnesses denied that such a conversation between appellant and Broussard took place (50-51).

At the trial it was stipulated by the Government and appellant, since appellant contended that he was not engaged in the business of accepting wagers in 1953, that he did not pay the special tax and did not register (pp. 279-280, Original Record). Appellant at no time admitted any participation in the business of accepting wagers (23) nor was he ever connected or identified as such (23-24), although viewed by at least 21 persons (pp. 166, 235, Original Record). In fact, he vigorously denied it on interrogation at his apprehension (29-30). No written statement was ever taken of appellant (34), albeit one was taken of Broussard (p. 330, Original Record).

On direct examination by the prosecutor, Vincent J. Gianatasio, a Government Agent assigned to the Alcohol & Tobacco Tax Division for over 20 years (footnote 7, *infra*), was asked to state the nature of conversation that had been had by the government agents with petitioner in the back room, and Gianatasio answered the question without making reference to any incompetent prejudicial matter (8a, Government's Appendix; pp. 190, 191, Original Record).[4] Specifically, on direct examination, Gianatasio

[4] The direct interrogation and response were as follows:

"Q. Were you present when *any* conversation was had with the defendant Apuzzo in the back room? A. Yes.

Q. What was the nature of that conversation? A. Well, we asked Mr. Apuzzo his name and his address and asked him what he was doing there. He told us that his name was Apuzzo and he gave me a Bronx address and he said he was visiting in the rear."

did not assert that he had queried petitioner with regard to a prior arrest and that he had elicited the admission that petitioner, on a prior occasion, 15 years ago, had been arrested for "policy."

However, when petitioner's counsel asked Gianatasio the self-same question regarding the conversation—even pinpointing as the prosecutor had done, the back room as the place where the conversation took place (35, compare prosecutor's question, footnote 4, *supra*)—Gianatasio, surprisingly enough, blurted out, "I asked him if he was ever arrested before" (35). Over petitioner's objection to this sudden launching into inadmissible prejudicial matter, the trial court authorized the agent to increase the damage by permitting him to give petitioner's alleged answer which, according to the agent, was ". . . he told me he had been arrested for policy about 15 years ago" (36).

Petitioner at once moved for a mistrial (36, 39).

Subsequently, the trial judge himself took full responsibility for this prejudicial disclosure and admonished the jury to disregard it (49), reserving decision on petitioner's motion for a mistrial until after the jury brought in a guilty verdict (55-57).

Appellant did not take the witness stand.

Pre-trial motions were made attacking the issuance of the search and seizure warrant and seeking the return of certain property seized and its use suppressed. These motions were denied (58-59, 63-64) without affording appellant a hearing as requested. In a nutshell, appellant argued that the government was attempting to obtain evi-

dence that appellant was operating a lottery—a state crime and not a federal offense—in violation of Rule 41 (b)(2) of the Federal Rules of Criminal Procedure.

These motions were denied respectively by District Judge Noonan, with opinion (pp. 56-57, *infra*) and District Judge Walsh, without opinion (63-64). These motions were renewed at the trial and denied as well by the Trial Court (pp. 40-52, Original Record).

ARGUMENT

I

Judges Clark and Medina, upon the rehearing by the Court of Appeals sitting *en banc* (see footnote 1, *supra*) after noting "the potential importance of the question in the administration of the criminal law," and that "the principles of procedure are most important" (30, 43, *infra*) held that appellant's counsel had opened the door to Gianatasio's testimony by his query on cross-examination, that the federal agent's answer was responsive and that petitioner may not object to the response he draws (pp. 39-40, *infra*).

Judge Hincks, in his concurring opinion, nevertheless held that error was committed when the Treasury Agent testified regarding petitioner's prior arrest (pp. 45-46, *infra*) but that such error was not of sufficient substance, since proof of petitioner's guilt was strong (pp. 46-47, *infra*).

Judge Waterman, in his concurring opinion, agreed with Judge Hincks that Agent Gianatasio had introduced error into the case with his statement that petitioner had told

him he had once before been arrested for policy (pp. 48-49, *infra*). Judge Waterman acknowledged that when the original bench, consisting of Chief Judge Clark, and Judges Frank and Waterman, had heard the case (footnote 1, *supra*),

> "He (Judge Frank) and I concurred in a proposed opinion written last term before the hearing *en banc* was decided upon that would have reversed the conviction and remanded for a new trial."

Judge Waterman continued:

> "At this term by memorandum vote after the hearing *en banc*, he reaffirmed his belief that the conviction should be reversed. It is, I think, of importance that his opinion be known, for it demonstrates that three of the five appellate judges who have considered the case concur with the district judge who tried it that the injection into the trial of this statement of a prior arrest was error" (p. 49, *infra*).

Judge Waterman took issue with Judges Clark, Medina and Hincks' view that petitioner's proof of guilt was overwhelming, stating:

> "The defense could well maintain that there was insufficient credible proof of any 'policy' participation by Apuzzo during the nine crucial days involved" (p. 53, *infra*).

Finally, however, Judge Waterman, who had originally voted for reversal with the late Judge Frank, decided to concur in the affirmance of petitioner's conviction on the ground that the trial judge had cured the error—"of such an exceptionally prejudicial character"—by clearly instructing the jury to disregard it (p. 54, *infra*).

A.

The opinion of Judges Clark and Medina that petitioner's counsel had opened the door to the Treasury Agent's testimony and had lost status to object to the prejudicial response, appears to be based in large measure, upon the erroneously purported circumstance—repeatedly stressed in the majority opinion—that petitioner's question dealt with a new conversation.

Thus, at page 37, *infra*, Judges Clark and Medina state:

> "Further colloquy ensued both before and out of the presence of the jury, in which the prosecutor pointed out that his questions on direct had been limited to certain particular incidents and defendant's counsel had opened the question of a more general conversation in the back room."

Again, at page 39, *infra*, they state:

> "We have already noted that this particular cross-examination opened up an entirely new conversation."
>
> (See also p. 39, *infra*.)

It is true that the prosecutor in his colloquy did claim, overgenerously, that his questions on direct had been limited in scope, as the above-quoted opinion states, but the record actually belied such assertion. The prosecutor's statement to the court was as follows (37):

> "May I say to your Honor that when I asked the questions I specifically tied it in with certain incidents. I asked him if there was a conversation with regard to the safe, as I recall it. I asked him if there was a conversation with regard to the scale.

> Now, this question, as I recall it, (210) was much broader than that. *He asked him if he had any conversation at all in the back room with him.*" (Emphasis supplied.)

Actually, however, as we have shown by our quotation from his direct examination at footnote 4, *supra*, it was the prosecutor himself who generally called for *any conversation in the back room* (without limitation to the scale or safe) and the petitioner, far from "opening up an entirely new conversation" as Judges Clark and Medina wrote, took pains not to elaborate or stray beyond the scope of the prosecutor's question on direct examination (8a, Govt.'s Appendix).

Defense counsel had also insisted as follows:

> "He (the prosecutor) asked him what the conversation was and he (the witness) didn't bring it out" (36).

Since Judges Clark and Medina's "opening the door" theory is thus based on a factual misconception, it follows that its validity is destroyed by the exposure of underlying factual error. One could safely speculate that such was the reason for Chief Judge Clark's apparent dissent from the majority of the panel which originally voted to reverse the petitioner's conviction (pp. 30, 49, *infra*).

Moreover, a witness' words, basically incompetent and irrelevant to the issues, and steeped in prejudicial influence, are not rendered unobjectionable by the circumstance that the interrogator had couched his question in colloquially generic terms. Sheer literal responsiveness of the answer is not the sovereign consideration overriding all the basic rules of evidence. A broad question may be put

by counsel for one side and permitted to go, unchallenged by his adversary without either being committed, beyond redemption, via waiver and estoppel, to any outlandish disfigurement of the precepts of trial evidence that may be vented by the witness.

Thus the defendant need not record objection to a proper question by the prosecutor to a government witness on direct examination, asking him to relate his conversation with the defendant ~~under penalty~~ of forfeiting his right to object to the witness' recitation of conversation relating to inadmissible prior offenses or other excludable subjects. The question is not deemed to authorize the witness to go off on a tangent of inadmissible testimony but contemplates that he confine himself to the bounds of the frame of reference set up by the rules of evidence.

See *Brown* v. *United States* [3 Cir.], 83 F. 2d 383, 386 in which the court wrote:

> "The testimony of the previous conviction of Carinelli should not have been admitted, and when the fact of Carinelli's previous conviction was included in the answer to a proper question, it should have been stricken out."

See, also, *United States* v. *James* [2 Cir.], 208 F. 2d 124.

At 23 Corpus Juris Secundum, Sec. 1070, p. 502, "Criminal Law", the text states:

> "Thus, where it is not apparent from the question that the answer will be inadmissible, as where an improper answer is given to a proper question, the question need not have been objected to in order to entitle the objecting party to move to strike out the answer;"

By the same token, when defense counsel is cross-examining a government witness, particularly an experienced federal law enforcement officer—a person who though he be not an attorney is nevertheless necessarily schooled in the rules of evidence and as they relate to his courtroom functions—the officer has the same obligation to stay within permissible evidentiary bounds which he had on direct examination.

Indeed, having confined himself to admissible conversation on direct examination, it would constitute sheer entrapment if upon cross-examination directed to the same subject-matter as his direct examination, he could launch into incompetent, prejudicial fields.[5]

In *Parilla* v. *U. S.* [6 Cir.], 280 F. 761, 765, the Court noted:

> "There may be cases where an answer is formally responsive, but yet where a part of it is so plainly incompetent and so far beyond anticipation that examining counsel would not be estopped to move to strike out that part;"

This was said in a case in which defendant's counsel had indeed made the prosecution's witness his own by address-

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[5] In *United States* v. *Silver* [2 Cir.], 235 F. 2d 375, cert. denied, 352 U. S. 880, cited in the opinion (p. 41, *infra*) of Judges Clark and Medina, the defendant had put his character in issue. Moreover, the question there permitted related to defendant's character. Arrest does not (*Michelson* v. *United States*, 335 U. S. 469, 482). The miscellany of other cases cited (p. 41, *infra*) are likewise drastically different from the instant case. The text of Sec. 18, p. 344, Wigmore, Evidence, 3d ed., to which footnote 34 is appended, also cited, reads:

> "Of course, also the opponent whose *question calls in advance* for obviously inadmissible evidence has waived objection to the answer." (Italics in original.)

ing to the witness questions beyond the scope of interrogation on direct examination, thus indicating that even when the defendant can be said to have "opened the door", the rule of waiver or estoppel based thereon will not be enforced in a criminal case when it would be unfair to the defendant to do so. *A fortiori*, when the defendant has not made the government witness his own, and a classic case of an incompetent answer beyond anticipation is foisted upon the trial proceedings by the witness—as in our case—waiver and estoppel to object must be completely ruled out.

Judges Clark and Medina, also invoked the rule of "Verbal Completeness" to justify the Treasury Agent's right to testify on cross-examination that petitioner told him of his prior arrest (p. 42; *infra*).

This argument is cogently refuted in the separate opinion of Judge Hincks (p. 46, *infra*) who wrote:

> "In this situation, I think, the judge erred in insisting on a continuation of the narration of the conversation. I see nothing to suggest that in the situation presented the discontinuance of the narration at the instance of the defense would subject the prosecution to the hazard of an unfavorable inference or would in any way operate to warp the truth or confuse the jury. That being so, I doubt the applicability of the doctrine of "Verbal Completeness" to which the majority opinion refers. But even if at all applicable, the rule of completeness is subject to a very reasonable qualification: 'where the remainder (of the conversation) is incompetent not merely as to form as in the case of secondary evidence or hearsay, but *because of its prejudicial character* then the trial judge should

> exclude if he finds that the danger of prejudice outweighs the explanatory value.' McCormick on Evidence, page 132. In other words, when—as here—the continued narration of a conversation will bring in inadmissible matter possibly prejudicial and adds nothing to a solution of the issues, neither the judge nor the opposing counsel may properly cause it to come in. *Gencarella* v. *Fyfe*, 1 Cir., 171 F. 2d 419; *People* v. *Baker*, 290 Ill. 349, 125 N. E. 263; *People* v. *Schlessel*, 196 N. Y. 476, 90 N. E. 44; *Hathaway v. Tinkham*, 148 *Mass.* 85, 19 N. E. 18. 20 Am. Jur., Evidence, Sec. 276; McCormick on Evidence, page 132, footnote 6; 31 C. J. S., Evidence, page 917 and footnote 82."

Moreover, in our case, we have the paramount consideration that the testimony of the Treasury Agent regarding petitioner's prior arrest was incompetent from its very outset—the officer's statement that he had asked petitioner regarding prior arrests was itself incompetent and highly prejudicial, and as we have already urged, not within the actual scope of the question either on direct or on cross-examination. Thus, there was no admissible evidence subject to "Verbal Completeness" and the doctrine could have no possible application and is not eligible to be invoked to sanction the Treasury Agent's further testimony regarding the petitioner's response to his query.[6]

Although petitioner first moved for a mistrial when the Treasury Agent was permitted to state petitioner's response to the Agent's inquiry to petitioner regarding prior

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[6] Petitioner's counsel, when the government agent injected the words, "I asked him if he was ever arrested before" (35), at once sought to accord his client maximum protection by further questions designed to de-emphasize and withdraw from the matter (36), but he was not permitted to do so (36; p. 45, *infra*).

arrest and did not move for a mistrial when the Agent first volunteered the information that he had questioned petitioner about prior arrests, it is clear that the waiver of right to demand mistrial was conditional upon petitioner being permitted to shut off this line of testimony by the Agent and thus keep from the jury the fact that the petitioner had had a blemish of a prior arrest for a policy violation.

Once the Agent was permitted to state under court aegis that petitioner had made the prior arrest admission, petitioner's motion for a mistrial must be deemed to relate back to the Agent's testimony that he had asked the arrest question since the Agent's question and the petitioner's answer once given, form a single objectionable entity.

The suggestion in the opinions of Judges Clark and Medina that the testimony of petitioner's prior arrest might have been admissible, even if elicited by the prosecutor (1499), is also unsound for the residual reason that prior arrest is not to be equated with prior conviction on the score of admissibility (*Michelson* v. *United States*, 335 U. S. 469, 482), although, unfortunately, for appellant the two are to be equated from the standpoint of prejudicial effect (*United States* v. *James* [2 Cir.], 208 F. 2d 124, *supra*).

B.

Judge Hincks despite his disagreement with the majority and his firm opinion that error had been committed, decided to affirm petitioner's conviction on the ground that he deemed the evidence against appellant to have been strong (pp. 46-47, *infra*). The opinion of Judge Waterman to the contrary, however, more accurately it is respectfully

submitted, reflects the state of the record and the applicable law. He wrote (pp. 52-53, *infra*):

> "Apuzzo's employees testified stoutly, also. If they were believed, there was similarly sufficient evidence to support a verdict of acquittal. The defense could well maintain that there was insufficient credible proof of any 'policy' participation by Apuzzo during the nine crucial days involved.
>
> Although on the record before us it is highly probable that appellant may be guilty as charged, I do not find that this 'record fairly shrieks the guilt', *Butwak* v. *United States*, 344 U. S. 604, 619 (1953), of Apuzzo during the time-period involved, nor do I believe that no reasonable jury could have acquitted. See, e.g., *United States* v. *Chieppa*, 241 F. 2d 635, 640 (2d Cir. 1957); *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (2d Cir. 1952), *cert. denied*, 344 U. S. 864.
>
> Therefore, it becomes a most delicate question for an appellate judge who believes that the evidence below of guilt is not completely overwhelming to appraise the effect that Gianatasio's statement may have had. For Gianatasio let the jury know that Apuzzo, himself, allegedly had said to the witness that he had been arrested for 'policy' about fifteen years ago. Even though instructed that the statement should be ignored, this statement, erroneously before the jury, could well be the decisive bit to convince a doubting juror of the defendant's guilt."

Judge Waterman noted succinctly (pp. 50-51, *infra*):

> "The Supreme Court has stated the test as follows:
>
> 'In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety,

> tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. * * *
>
> 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress: *Bruno* v. *United States, supra* (308 U. S. 287), at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' *Kotteakos* v. *United States,* 1946, 328 U. S. 750, 762, 764-765."

Judges Clark and Medina stated "All four agents testified, without substantial contradiction and quite unshaken after extensive cross-examination" (p. 32, *infra*).

In Appendix E, *infra*, we have set forth in tabular form a partial compilation of the testimony of the agents we deem refutatory of the court's view that the agents testified without substantial contradiction and remained unshaken by cross-examination.

Indeed, Judge Waterman's contrary appraisal of the testimony led him to state "* * * nor do I believe that no reasonable jury could have acquitted" (p. 53, *infra*). Petitioner's "first assignment of error [in the Court of Appeals had been] there was insufficient evidence to support the finding of guilt, and this he has pressed vigorously on appeal" (Clark, *Ch. J.*, p. 34, *infra*).

C.

When the witness who thus grievously prejudices the defendant's case by conspicuously bringing to the necessarily indelible notice of the jury the fact that the defendant had been arrested for another crime, is an experienced federal law enforcement officer—in a sense, a government witness by profession employed as such by the government—the question arises whether a conviction obtained at a trial thus featured may stand, or whether on the other hand this court in its supervisory role (cf. *McNabb* v. *United States*, 318 U. S. 332 invoked by this Court in *Grunewald et als.* v. *United States*, — U. S. —, 77 S. Ct. 963, 984), should not discountenance the prejudicial evidentiary episode as unworthy of the standards of the administration of criminal justice prevailing in the federal courts and invalidate the conviction.

The testimony of the federal agent is cognizable as government action (cf. *Shelley* v. *Kramer*, 334 U. S. 1, 14) and is to be judged by more vigorous criteria and standards than those which prevail where a casual private witness' role is being assayed (cf. *Lanza et al.* v. *N. Y. State Joint Legislative Committee*, 3 App. Div. 2d 531, rev'g 5 Misc. 2d 324, affd. — N. Y. —, application for stay pending before Mr. Justice Harlan).

It may be that where a casual witness' introduction of incompetent evidence is concerned, practical considerations of avoiding a succession of new trials may cause the courts to deem error cured by an admonition to disregard erroneously injected evidence, despite the acknowledged verity of the now famous statement by Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 453, as quoted in footnote 4 in Judge Waterman's opinion (p. 53, *infra*):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

See also to the same effect, the dissenting opinion of the late Judge Frank in *United States* v. *Grunewald, Bolich and Halperin* [2 Cir.], 233 F. 2d 556, 573, 574, reversed by this Court on May 27, 1957 (— U. S. —, 77 S. Ct. 963). It is respectfully submitted that this Court's decision therein implicitly gives governing effect to Justice Jackson's words.

In any event, when Treasury Agents are primarily concerned as witnesses, this Court, it is respectfully urged, should apply the *McNabb* doctrine—also applied in this Court's reversal in the *Grunewald, Bolich and Halperin* cases—and not permit a conviction to stand where government agents have prejudiced a defendant's case by injecting into the testimony incompetent evidence of a prior arrest for policy.

United States v. *Giallo* [2 Cir.], 206 F. 2d 207, affirmed 346 U. S. 929 (*Per Curiam*) is not to the contrary since in that case the Court of Appeals stated with regard to the Treasury Agent's unresponsive reference to a defendant's

arrest, "the jury might well have supposed that the arrest [referred to] was on the indictment on which he was being tried" (p. 209 of 206 F. 2d).

Moreover, the very fact that there has been a somewhat similar recurrence of prejudicial incompetent testimony by the very same government agent, Gianatasio, relating to a defendant's prior arrest[7]—if this Court agrees that such was indeed the case—shows the urgent necessity for this Court to invalidate the conviction of appellant under the *McNabb* doctrine as now reaffirmed in *Gruenwald et als. v. United States*, — U. S. —, 77 S. Ct. 963, rev'g 233 F. 2d 556 (2 Cir.).

The failure to invalidate petitioner's conviction conceivably may encourage the growth of a practice by Government law enforcement officers when testifying as witnesses on behalf of the Government in criminal prosecutions of withholding prejudicial evidence which would be inadmissible on direct examination until cross-examination to the detriment of the defendant. Neither the defendant nor his trial counsel should be exposed to the wiles or toying of overzealous or vindictive government witnesses. This Court's disapproval of a practice potentially sharp and inherently unfair to the defendant should be enunciated now before its use becomes widespread.

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[7] Judge Waterman carefully noted this in footnote 1, p. 48, *infra*, which reads as follows:

> "Gianatasio, one of the government witnesses, all of whom were employees of the U. S. Treasury, was an experienced investigator with the Alcohol & Tobacco Tax Division, and had been an employee of the Treasury for more than twenty years. Before this he had been a witness for the Government. For instance, he testified in a case cited in all three of our opinions here, *United States v. Giallo*, 206 F. 2d 207, at 209 and footnote 2 (2 Cir. 1953.)"

II

Petitioner has consistently contended that the search warrant issued by District Judge Weinfeld (p. 432, Original Record) was insufficient on its face and that the government proceeded illegally in view of the wording of Rule 41 (b) (2) of the Federal Rules of Criminal Procedure. Under pertinent provisions of that Rule, a warrant may only be issued to search for and seize any property:

> "(1) * * *
>
> (2) Designed or intended for use or which has been used as the means of committing a criminal offense, or
>
> (3) * * *"

The search warrant and the supporting affidavits (pp. 447-451, Original Record) contain statements that what were sought to be seized and secured are "a number of records and other evidence including monies relating to the *operation of a lottery.*" There was also an averral that wagers were placed inside the premises.

Concededly, the items seized, to wit; books, papers, currency, policy slips, checks and other items found in the butcher shop were not in any sense *contraband* like unstamped whiskey, counterfeit coins, narcotics or stolen vehicles, the latter of which are clearly designed or intended for use, or which has been used, as the means of committing a federal criminal offense. Rather, at most, the policy slips found in the premises could only be the basis of a substantive violation of Sec. 974 or 975 of the New York State Penal Law but not any applicable Federal Law. (See *Batten* v. *United States*, 188 F. 2d 75; *In re Fried*, 161 F. 2d 453; *United States* v. *Snow*, 9 F. 2d 978; cf. *Nelson* v. *United States*, 208 F. 2d 505, which was a case

involving the operation of a lottery in violation of a substantive District of Columbia law, but not applicable in the case *sub judice*. Several of the items seized were at first admitted into evidence but later withdrawn (3a, Government's Appendix).

It is interesting to note that District Judge Noonan, in denying the pre-trial motion of appellant, *in toto*, wrote:

> "We are not here concerned with whether or not the operation of a lottery is, per se, a Federal offense" (p. 57, *infra*).

In any event, it must be conceded that policy or lottery is not a Federal offense. Indeed, in *United States* v. *Kahriger*, 345 U. S. 22, this Court upheld the constitutionality of the applicable statutes herein as a revenue measure (26 U. S. C. Secs. 3285-3294) by rejecting the contention that Congress was attempting to penalize intrastate gambling or to treat it as penal, holding at page 26:

> "The wagering tax with which we are concerned applies to all persons engaged in the business of receiving wagers, regardless of whether such activity involves state law."

Mr. Justice Harlan, in *United States* v. *Calamaro*, — U. S. — (decided June 17, 1957) wrote:

> "It is doubtless true that these provisions, as well as the occupational tax, were designed at least in part to facilitate collection of the excise tax."

Indeed, if Congress had as much as treated wagering as criminal, the law would have been unconstitutional (*Sonzinsky* v. *United States*, 300 U. S. 506, 513; *United States* v. *Calamaro*, *supra*). Thus, not only is lottery not

made a federal crime by the statute herein but there is not even a federal penalty for violation of a state law. If it were, it would also be unconstitutional (*United States* v. *Constantine*, 296 U. S. 287, 294).

Thus, the lottery slips herein were merely evidentiary business records and not a legal subject for search and seizure.

In *United State* v. *Lefkowitz*, 285 U. S. 452, 464-465, this Court wrote:

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310."

The decisions of this Court have long distinguished searches of one's house, office, papers or effects merely to get evidence to convict him of crime (cf. *Kremen* v. *United States*, 353 U. S. —, 1 L. ed. 2d 876; 77 S. Ct. 828) from searches such as those to find stolen goods for return to the owner, to take property forfeited to the Government, to discover property concealed to avoid payment of duties for which one is liable and from searches such as those made for the seizure of burglars' tools, counterfeit coins, and illicit liquor in order to prevent the commission of crime (*Wrightson* v. *United States*, 222 F. 2d 556; *Marby* v. *United States*, 293 F. 849; *Boyer* v. *United States*, 92 F. 2d 857; *Hobson* v. *United States*, 226 F. 2d 890; *Steele* v. *United States*, 267 U. S. 505).

The search and seizure herein—which strangely enough was the first of its kind (30)—and the search warrant which authorized the action violated also, we respectfully submit, the constitutional provision against self-incrimination (*United States* v. *Lefkowitz*, 285 U. S. 452, 466, 467, citing *Boyd* v. *United States*, 116 U. S. 616. In the *Boyd* case, Mr. Justice Bradley wrote at page 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security * * * but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Petition

Appendix A

Court of Appeals Opinions

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 132, 133—October Term, 1956.

(Argued November 14, 1956 Decided May 28, 1957.)

Docket Nos. 24019, 24020

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SALVATORE APUZZO,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and

FRANK,[1] MEDINA, HINCKS, and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge*.

Salvatore Apuzzo appeals from his conviction on verdict of a jury for failing to register and to pay the special federal gambling tax and for conspiring to commit these crimes. Affirmed.

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[1] Judge Frank heard the argument of this case on the original hearing and on the rehearing *en banc* and voted to reverse and remand, preparing supporting memoranda to that effect. He died, however, before this opinion was written.

ARNOLD D. ROSEMAN, New York City (George M. Lehr, New York City, on the brief), *for defendant-appellant.*

MAURICE N. NESSEN, Asst. U.S. Atty., S.D.N.Y., New York City (Paul W. Williams, U. S. Atty., and George S. Leisure, Jr., Asst. U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

CLARK, *Chief Judge*:

This appeal involves a criminal prosecution presenting generally routine matters, leading to a clearly justified conviction and an appropriate, if light, sentence for this defendant. A single issue, as to testimony about the defendant's arrest fifteen years earlier, presented challenge; and because of its potential importance in the administration of the criminal law after the initial hearing before a panel of Judge Frank, Judge Waterman, and myself, the court ordered another hearing before the full bench.[2] This second hearing on oral argument and further briefs resulted in a majority vote for affirmance.

Salvatore Apuzzo, the defendant, was prosecuted under two informations: one information alleged that he and two codefendants, Samuel Aaron and Ernest Broussard, were engaged during the month of August 1953 in the business of accepting wagers individually and as a copartnership, and that they willfully failed to register and pay the special occupation tax on gamblers in violation of 26 U. S. C.

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[2] Except for Judge Lumbard, who disqualified himself, since he was United States Attorney during the prosecution.

§§2707(b), 3277, 3290, 3291(a), 3292, and 3294. The other information charged the three men with a conspiracy, during the period July 28 to August 5, 1953, to commit those crimes in violation of the general conspiracy statute, 18 U. S. C. §371. Aaron and Broussard pleaded guilty to the second information, only Apuzzo stood trial. The jury found him guilty on both informations. He was sentenced on the first information to a $3,000 fine and 60 days' imprisonment, followed by 4 years' probation; on the second information, sentence was suspended and a 4-year probation period imposed, to run concurrently with that on the first information. He appeals from this judgment of conviction.

It is undisputed that the defendant is the proprietor of a small butcher shop at 363 Lenox Avenue, New York City, and has been in the butcher business for 15 or 20 years. His brother-in-law, Isidori, who had been in his employ as a butcher for 6 years, testified that normally the defendant opened the safe in the store early each morning before going to the market to buy meat. Defendant and Isidori, the same witness stated, worked at the store every evening between 5 and 8 o'clock. Codefendants Aaron and Broussard were employees of the defendant who worked behind the counter of the store at the times in issue here.

From July 28 to August 5, 1953, two federal agents made five visits to the butcher shop between 12:30 and 1:30 in the afternoon, and placed "policy" bets with Aaron and Broussard, who were behind the counter. The two agents testified, without contradiction, that during these visits they saw people lined up in front of the counter placing bets, and that on an occasion when one agent asked Aaron what number had won the day before Aaron pointed to three

numerals which were posted on the front of the scales. Prior to their visit on August 5, 1953, both agents prepared carbon copies of policy slips; and upon entering the butcher shop they made bets with the originals and kept the carbon copies for evidence. During this whole period Aaron and Broussard, in addition to accepting bets, were also engaged in selling meat; and the defendant was never seen in the store by the two agents.

Later in the afternoon of August 5, 1953, pursuant to a valid search warrant, four agents raided the shop, proceeding through the main part of the store to a small room in the rear. All four agents testified, without substantial contradiction and quite unshaken after extensive cross-examination. They established that they found the defendant with two bystanders in the back room inspecting ties which an itinerant tie merchant was trying to sell. As the agents entered the room they wore their badges and announced their identity as federal men. One or more of them had drawn guns. Each agent questioned a different person found in the room, and Agent Lemler was apparently the first to question Apuzzo. Apuzzo at first maintained that he was only a visitor to the store and then claimed he recently rented it from one John Sloan. When Agent Gianatasio searched him Apuzzo produced a wallet containing a car registration listing him as a resident of Scarsdale, but to questions he answered that his address was in the Bronx. Cash in the amount of $1,366 was found on the defendant's person, and several thousand money wrappers and several hundred pads of paper were found in the rear room. . .

The agents and the defendant then proceeded into the front part of the store where the safe was and Apuzzo was asked to open the safe. According to the agents' testimony he denied knowledge of the combination until told it would be necessary to remove the safe from the premises and break it open, when he proceeded to open it. Within the safe were numerous compartments which were then broken open. Within them was found between $10,000 and $11,000 in cash, ownership of which Apuzzo immediately claimed, explaining that he kept it there to avoid having a lien placed on it as part of proceedings pending against him in the Tax Court. Also in the safe were two envelopes containing undated policy slips and some personal papers of defendant.

The agents then asked whether there were any other policy slips in the store. At that juncture, according to the agents, defendant pointed to the scale near which stood codefendant Broussard; and the defendant said, "Ernie, give them the slips." Broussard then removed the weighing platform of the scale revealing about 150 recent policy slips, including the two bets the agents had placed that day. At the trial it was stipulated that defendant did not pay the special tax and did not register.

Apuzzo did not take the stand, but relied for his defense on the testimony of his brother-in-law, Isidori, and codefendant Broussard, both employees of his. On cross-examination it was shown that Broussard had lied about his own participation in the gambling operation when first arrested and had subsequently pleaded guilty and been convicted. It also came out that after his conviction his wife had asked the defendant to rehire him, and at the time of the trial Broussard was again in Apuzzo's employ. Isidori testified

that he, Isideri, was home the afternoon the agents raided the store, and was surprised to receive a telephone call from defendant asking for the combination to the safe. He was surprised because Apuzzo knew the combination and opened the safe each day; Apuzzo sounded very agitated when he called. Broussard testified in regard to the scale incident that Apuzzo told him merely to give the agents the policy slips if he, Broussard, knew anything about them. The explanation advanced by counsel for defendant's evasive behavior when confronted by government men was that he first thought it was a holdup and then feared they were after him in connection with his pending tax matter. The defense was that Apuzzo never knew Broussard and Aaron were conducting a gambling operation in his store.

Defendant's first assignment of error is that there was insufficient evidence to support the finding of guilt, and this he has pressed vigorously on appeal. But this is completely without merit; actually the government presented a very strong case. It became common ground, as the trial progressed, that defendant's butcher shop was the scene of extensive policy operations. Hence the only possible defense was that Apuzzo, the proprietor, was quite oblivious to what was known and obvious in the neighborhood.[3] But this will not hold water. The evidence that the defendant's

[3] The conclusion that he was knowing but tolerant will not suffice, since then he would be devoting the facilities of his shop to the furtherance of the venture and the advancement of the conspiracy. Further, an inference that he would allow his business to assume the reputation of a notorious gambling place out of good nature alone, and with no share of the gain, is hardly reasonable. See *United States* v. *Masiello*, 2 Cir., 235 F. 2d 279, certiorari denied 352 U. S. 882.

employees were openly receiving bets in his little store day after day; that winning numbers were posted on the front of the scale; that policy slips, as well as $10,000 in currency belonging to this apparently petty butcher shop, were found in the safe; that he lied about his identity when first accosted and lied about knowing the combination to the safe; and that he pointed to the scale where the recent policy slips were hidden when it appeared that the jig was up —all this makes the rather pitiful attempts of his employees to take the blame quite patently unsuccessful. In fact, even though it was contradictory and largely discredited, the testimony of the employees actually provided a certain amount of corroboration in details such as the defendant's knowledge of the combination to his safe. On the record the jury could hardly have brought in any other verdict. We turn, therefore, to the question of evidence at the heart of this case.

The incident here involved occurred on the second day of trial, after four government agents had testified and been cross-examined as to the facts already described. The government called the fifth agent, Gianatasio, who testified on direct as to incidents both in the back room and in the main part of the store. The prosecutor, in examining Gianatasio as to the conversation in the back room, brought out the facts mentioned above, that Apuzzo gave a Bronx address despite his Scarsdale car registration and that Apuzzo at first denied being the owner of the store. The defense counsel extensively questioned Gianatasio on cross-examination until the following exchange occurred:

"Q. Did you then have a conversation with the defendant? A. Yes. I—

"Q. What did you say to him and what did he say to you? A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx address. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before.

"Mr. Roseman: At this time, your Honor—

"The Witness: You wanted to know what I asked him.

"Mr. Roseman: All right.

"The Court: At this time what?

"Mr. Roseman: I don't want the witness to just keep answering. I would rather ask the questions.

"The Court: You asked him what the conversation was. I didn't know that he had finished.

"Q. Did you tell Mr. Lemler—

"The Court: Had you finished telling about the conversation?

"The Witness: No, sir.

"Q. Did you tell Mr. Lemler—

"The Court: Just a minute. He didn't finish.

"A. When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago. He didn't know the exact date.

"Mr. Roseman: At this time I object to the testimony and move for a mistrial.

"The Court: On what ground?

"Mr. Rosenfan: On the ground that this is prejudicial to the defendant."

The pertinent subsequent colloquy was as follows:

"Mr. Roseman: Yes, but that conversation is prejudicial.

"The Court: You brought it out.

"Mr. Roseman: He [the prosecutor] asked him what the conversation was and he didn't bring it out.

"The Court: Then why did you ask him to repeat it?

"Mr. Roseman: I wanted to see if he was telling the truth.

"* * *

"The Court: It was responsive. I don't see how you can control what the witness said in answer to the question.

"Mr. Roseman: I didn't open any door.

"The Court: You asked him what was said."

Further colloquy ensued both before and out of the presence of the jury, in which the prosecutor pointed out that his questions on direct had been limited to certain particular incidents and defendant's counsel had opened the question of a more general conversation in the back room. The court then reiterated several times its view that defendant had opened the issue and, the witness having sworn to tell the truth, "[h]ow could he possibly suppress part of the conversation?" But ultimately the court consented that counsel research the point over the holiday week-end. When the court reconvened on Monday the judge heard further argument, after which he decided to assume the blame for

bringing out the testimony, but to direct the jury to disregard it. This he did in careful and precise instructions both then and later in his formal charge.[4] But defendant urges that all this was insufficient to save the conviction.

The crux of defendant's contention is that the trial judge erred fatally when he did not keep from the jury the fact, whose truth is nowhere disputed, that fifteen years before this trial Salvatore Apuzzo was arrested for "policy." We are asked to rule that a new trial is mandatory because the jury, having learned this fact, may have inferred from it

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[4] The court's statement to the jury was as follows:

"Good morning, ladies and gentlemen. I am sorry that we had to keep you waiting. All I can do is to assure you that we have not been idle while you have been in there, which probably even in this short period may have seemed to you a lot of time.

"However, at the close of the last session there was a witness on the stand who was asked a question by counsel for the defense and in answering the question said something about the previous arrest of this defendant.

"That ought not to have been brought out. Counsel in asking the question did not expect that it would be brought out, did not try to bring it out, and it was only on my insistence, and I wrongly insisted on it, that he told the whole story that was brought out.

"Now, the reason that the law does not permit testimony with respect to previous arrests is that an arrest means absolutely nothing, just as I told you at the beginning of the case; a man is presumed to be innocent until he is found guilty, and the arrest is nothing more than the information that I was talking to you about, so that it has no bearing on the question in the eyes of the law. And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out."

Finally, in his charge to the jury the next day, Tuesday, the judge further warned the jury as follows:

"Any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant."

more than was warranted. And so, once the evidence had come out, there was nothing the judge could do to save the trial; an entirely new start was necessary and inevitable. The government claims, however, that the judge was entirely correct, since the defense brought out the evidence, and that in any event the admission could have done no harm in view of the judge's charge and the overwhelming proof of guilt. In Judge Medina's and my opinion the first ground is sound and entirely adequate without need of resort to the second ground.

Preliminarily to our discussion let us summarize the situation as it came before the judge. We have already noted that this particular cross-examination opened up an entirely new conversation. Further we should note these factors: (1) the witness' reply ending, "I asked him if he was ever arrested before" was a responsive and necessary answer to a direct question; (2) with this answer the damage, if any, was done and all the rest was but necessary clarification or repair in order not to leave the witness, the defendant, and the prosecution in an equivocal position where the worst might be suspected as to each; (3) the judge's ruling and the reply of the witness were made when the only objection before the court was that counsel did not "want the witness to just keep answering," and that he "would rather ask the questions"; (4) the judge was initially of the view that the defendant had opened the door and that the witness under oath could not suppress the testimony, but ultimately he decided—quite overgenerously—to assume entire responsibility, a course which obviously would relieve counsel of embarrassment to his

client; and (5) the jury was charged, as precisely as is conceivable, to disregard the testimony.

It is now commonplace that the rules of evidence have tended ever more freely in the direction of admission of all relevant testimony in the light of modern experience that the truth is more often found by full revelation than by concealment. Hence we have the modern principle, stated in the Model Code of Evidence, and now embodied in Uniform Rules of Evidence, Rule 7: "*General Abolition of* * * * *Exclusionary Rules.* Except as otherwise provided in these Rules, * * * (f) all relevant evidence is admissible." And we have often admonished our trial judges to err, if at all, on the side of the admission, rather than the exclusion, of evidence. A trial judge must rule on admissibility quickly and almost by instinct; his instinct ought to be to bring out the truth, rather than to permit a party to cover up a part of his case. It is true that there are certain special privileges, such as that against self-crimination, which rest on a different background; but outside of these the search for the truth should be the lodestone.

Now in this search there are of course areas of irrelevancy where matter is kept from the jury because the danger of prejudice exceeds its probative force. Testimony about a defendant's prior misdeeds is usually excluded on this basis, although the trial judge may allow it in his discretion where it casts particular light on the defendant's identity or specific intent to commit the crime. See *United States* v. *James*, 2 Cir., 208 F. 2d 124, 125; McCormick on Evidence 329 (1954); 2 Wigmore on Evidence §§300-304 (3d Ed. 1940). But the question of possible admissibility

for such purposes[5] was of course never reached, since the prosecutor did not offer it, and the incident did not develop so far as to raise the issue. More pertinent here is the fundamental principle of evidence that a party by asking a broad question of the kind here involved may not object to the admission of the response he draws. See, *e.g.*, *United States* v. *Silver*, 2 Cir., 235 F. 2d 375, certiorari denied *Silver* v. *United States*, 352 U. S. 880; *Fidelity & Deposit Co. of Md. v. Lindholm*, 9 Cir., 66 F. 2d 56, 89 A. L. R. 279; *Pilot Ins. Co.* v. *Wise*, 5 Cir., 61 F. 2d 481; *Pabst Brewing Co.* v. *E. Clemens Horst Co.*, 9 Cir., 264 F. 909; *Riddle* v. *Gibson*, 29 App. D. C. 237; *Clum* v. *Guardian Life Ins. Co.*, D. C. M. D. Pa., 24 F. Supp. 396, reversed on other grounds, *Guardian Life Ins. Co. of America* v. *Clum*, 3 Cir., 106 F. 2d 592, certiorari denied *Clum* v. *Guardian Life Ins. Co.*, 309 U. S. 666; *Artcher* v. *McDuffie*, 5 Barb., N. Y., 147; *Levy* v. *Cascades Operating Corp.*, 176 Misc. 373, 27 N. Y. S. 2d 258, reversed 263 App. Div. 882, 32 N. Y. S. 2d 341, reversed 289 N. Y. 714, 46 N. E. 2d 343; 1 Wigmore on Evidence §18, note 34 (3d Ed. 1940); *Rex* v. *King*, 26 Cr. App. R. 158. This rule is grounded in the realities of trial experience; for generally speaking it is quite impossible for a litigant to compel a hostile witness to respond to questions and simultaneously keep the responses from the jury if and when they contain references to prejudicial incidents, such as prior arrests or convictions. Nor can the responsibility for the testimony be shifted from defense counsel to the trial judge. That counsel tried to withdraw his question after the damage was done did not help his case, nor was his objection at all clear. Indeed it then seemed—as

[5] *E.g.*, to show prior knowledge of the criminality of the act were defendant to rely on the contention noted in note 3, *supra*.

he said in effect—that he was simply trying to introduce a new question without waiting for the witness to complete his answer to the former inquiry.

Moreover, in the circumstances presented here the trial judge would have been well within his discretion in requiring the witness to complete his answer even if proper objection were made. In an effort to show that Gianatasio's earlier testimony about incidents in the back room was fabricated or inaccurate, the defense asked him to relate the whole conversation which passed between himself and Apuzzo. Presumably the question was to show the jury that the witness could not recall the entire conversation or to suggest inconsistencies with the testimony of other agents, though actually they were not present at the conversation. But the witness was cut off before he finished his reply. If he considered the issue sufficiently germane, the trial judge could have allowed the government on redirect examination of the witness to complete the conversation to demonstrate that his story was neither fabricated nor based on hazy memory. Or had the prosecution, on redirect, asked for the full conversation—to avoid prejudice to the government from having suggested a black mark it could not support—it would have been proper, indeed almost necessary, that the judge admit the testimony. This is the familiar doctrine of "Verbal Completeness," see 7 Wigmore on Evidence §§2094, 2115 (3d Ed. 1940), and is designed to prevent limitation of evidence to warp the truth and confuse the jury. Where the testimony necessary to complete the story is hearsay or other excludable matter the trial judge has discretion in deciding whether

or not to permit completion. McCormick on Evidence 132 (1954). The same discretion must be allowed when completeness is sought not on redirect, but in the course of the cross-examination, as here.

Some suggestion for differentiation of this case is made that the defendant's counsel was taken by surprise and that the prosecution engineered the introduction of the testimony. Both grounds are ill founded and irrelevant. It is inconceivable that defense counsel experienced in criminal cases would have indulged in all the extended cross-examination of the government agents without appreciation of the risk involved. His hope of finding some inconsistencies in the evidence must have been tempered by knowledge of the risk of turning up something he would not like. But in any event the sound general principle that a litigant cannot object to, or secure a mistrial for, evidence he himself produces cannot be controlled by the degree of naiveté or sophistication of counsel. So far as the prosecution is concerned, there is nothing remotely to suggest impropriety on the part of the United States Attorney or indeed on the part of the witness unless answering responsively to a direct question can be so termed. But further, the implication that somehow the testimony should be geared to the defendant's objections is surely a dangerous one. It is hard to see how reversal here can be had without the implication that testimony should be manipulated, the last thing this court should even suggest.

The discussion had indicates that, while this prosecution may not be important in itself, the principles of procedure are most important. Particularly where the prosecution

of crime is so important to the welfare of the community as in New York City must we take care lest we place in the hands of shrewd defense counsel an unjustifiable tactic for reversing fair convictions of guilty men. For if the defense can indulge in unlimited cross-examination and seek reversal on what is dredged up, then counsel will surely take advantage of this one-way street. In truth, if mistrials are thus easily secured then traps may be set forth for the judge whose very good nature is later labeled fatal error. Over-all it weakens the judge's control of his courtroom and his outstanding position in trial work. Of course, if through accident or through miscalculation of counsel the jury should learn facts about the defendant so inflammatory that they could not thereafter give him a fair trial, a new trial would be necessary; but neither the trial judge nor we think that the incident involved here even approached such a nature. Here the long record carefully examined shows outstanding skill, patience with the repetitive cross-examinations, and scrupulous care for the rights of the defendant on the part of a judge "distinguished for his courtesy, thoroughness and patience." *Valensi v. Iravani*, 2 Cir., Mar. 29, 1957, —— F. 2d ——, ——. We have not hesitated to reverse district judges when their conduct of a specific trial seems to have resulted in unfairness; we shall stultify ourselves and the administration of criminal justice in this important district if we hold ourselves unable to recognize good trial conduct by a judge and take a case such as this out of his hands for automatic reversal.

In vew of our firm conviction that Judge Dimock acted both fairly and wisely we have not thought it necessary to discuss the other point argued, namely, that in no event

was there error here which persisted beyond the judge's charge and was actually prejudicial. *United States* v. *Raspovich*, 2 Cir., 241 F. 2d 779; *United States* v. *Cioffi*, 2 Cir., 242 F. 2d 473; *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, 210, affirmed *Giallo* v. *United States*, 346 U. S. 929.

Other claimed errors do not merit discussion.

Affirmed.

Judge MEDINA concurs in this opinion.

HINCKS, *Circuit Judge*, concurring:

Merely because defense counsel asked Gianatasio to relate his entire conversation with the defendant, the defense was not necessarily precluded, in my opinion, from withdrawing its request when the conversation had been only partially related. After Gianatasio in the course of his testimony said: "I asked him if he was ever arrested before," defense counsel interposed: "I don't want the witness to just keep answering. I would rather ask the questions" and then twice began a question about some other conversation. This made it abundantly plain that the defense was seeking to withdraw its blanket request for the whole conversation. And to have allowed him to proceed with his new line of inquiry would not have left the jury under the erroneous and confusing impression that the Gianatasio conversation with the defendant had been completed. For Gianatasio on a proper inquiry by the judge said bluntly that he had *not* "finished telling about the conversation."

In this situation, I think, the judge erred in insisting on a continuation of the narration of the conversation. I see nothing to suggest that in the situation presented the discontinuance of the narration at the instance of the defense would subject the prosecution to the hazard of an unfavorable inference or would in any way operate to warp the truth or confuse the jury. That being so, I doubt the applicability of the doctrine of "Verbal Completeness" to which the majority opinion refers. But even if at all applicable, the rule of completeness is subject to a very reasonable qualification: "where the remainder [of the conversation] is incompetent not merely as to form as in the case of secondary evidence or hearsay, but *because of its prejudicial character* then the trial judge should exclude if he finds that the danger of prejudice outweighs the explanatory value." McCormick on Evidence, page 132. In other words, when—as here—the continued narration of a conversation will bring in inadmissible matter possibly prejudicial and adds nothing to a solution of the issues, neither the judge nor the opposing counsel may properly cause it to come in. *Gencarella* v. *Fyfe*, 1 Cir., 171 F. 2d 419; *People* v. *Baker*, 290 Ill. 349, 125 N. E. 263; *People* v. *Schlessel*, 196 N. Y. 476, 90 N. E. 44; *Hathaway* v. *Tinkham*, 148 Mass. 85, 19 N. E. 18. 20 Am. Jur., Evidence, Sec. 276; McCormick on Evidence, page 132, footnote 6; 31 C. J. S., Evidence, page 917 and footnote 82.*

Nevertheless, I would affirm the conviction on the ground that the error was not of sufficient substance to require a

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*As to all other claims of error I am in full accord with the majority opinion.

mistrial ** or reversal. The most pertinent Supreme Court precedent is *Lutwak* v. *United States*, 344 U. S. 604. Here, as in *Lutwak*, the evidence of guilt is strong, as the majority opinion shows. Indeed the very strength of that evidence gives "fair assurance * * * that the judgment was not substantially swayed by the error." Thus reversal is not required under *Kotteakos* v. *United States*, 328 U. S. 750, and *Krulewitch* v. *United States*, 336 U. S. 440. In view of the massive weight of evidence pointing to guilt, it would be quixotic to attribute the verdict to the mere narration of an admission of an *arrest* for policy fifteen years earlier, especilly in view of the judge's instruction, promptly made and later repeated in his charge, to disregard the admission of the prior arrest. *United States* v. *Raspovich*, 2 Cir., 241 F. 2d 779; *United States* v. *Chieppa*, 2 Cir., 241 F. 2d 635; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, 932, cert. denied 344 U. S. 864; *United States* v. *Nimerick*, 2 Cir., 188 F. 2d 464; cert. denied 313 U. S. 592. Indeed, one may doubt that the express admission of the prior arrest, which came in and was the subject-matter of cautionary instructions, was as hurtful to the defense as would have been the admission which the jury would naturally have implied from the defense tactic in running away from the conversation which it had invited.

** I think the trial judge was in a better position than we to gauge the effect of the admission of the prior arrest. We should therefore give substantial weight to his evaluation of the problem. *Webb* v. *United States*, 10 Cir., 191 F. 2d 512; *United States* v. *Coffi*, 2 Cir., 242 F. 2d 473; *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, aff'd 346 U. S. 929.

WATERMAN, *Circuit Judge*, concurring:

I concur with my colleagues in affirming the conviction below. I agree with Judge Hincks for the reasons so ably stated by him—and with Judge Dimock—that witness Gianatasio's[1] statement that Apuzzo told him he had been arrested for policy about fifteen years before introduced error in the case.[2] I disagree with Chief Judge Clark and Judge Medina who maintain this unfortunate statement was a proper one to be made under the circumstances of its making since it was elicited during cross-examination. I affirm because I am convinced from an examination of the stenographic minutes of the proceedings in their entirety that Judge Dimock's subsequent admonitions to the jury to disregard this testimony must have been heeded. I have enough confidence in jurors to believe that in the setting of this particular case—serious though the admission of this damaging inadmissible testimony most assuredly was—the sincerity of the trial judge in stating and restating his personal acceptance of the entire blame,[3]

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[1] Gianatasio, one of the government witnesses, all of whom were employees of the U. S. Treasury, was an experienced investigator with the Alcohol & Tobacco Tax Division, and had been an employee of the Treasury for more than twenty years. Before this he had been a witness for the Government. For instance, he testified in a case cited in all three of our opinions here, *United States* v. *Giallo*, 206 F. 2d 207, at 209 and footnote 2 (2 Cir. 1953).

[2] The error occurred because the trial judge, evidently completely unaware of what the witness would testify to, insisted that the witness continue to answer a question asked of him on cross-examination after he had been stopped by the cross-examiner, despite the cross-examiner's efforts to waive further reply and to ask a new question. In continuing his answer, the witness, so protected by the judge, brought out the damaging testimony.

[3] See Chief Judge Clark's opinion, footnote 4.

and his wish that for that reason the jury ignore the testimony, must have had its effect. Were I not so persuaded I would be forced to dissent—for I do not agree with Judge Hincks that the evidence in the case points so overwhelmingly to the guilt of the defendant as to require affirmance on the ground that the error, had it not been cured, would have been harmless.

Judge Frank was on the panel that heard argument in this case last term, and sat with us *en banc* when it was argued at this term. He was consistent throughout in holding that error was committed here, that this error was not harmless, and that it was not cured. He and I concurred in a proposed opinion written last term before the hearing *en banc* was decided upon that would have reversed the conviction and remanded for a new trial. At this term by memorandum vote after the hearing *en banc*, he reaffirmed his belief that the conviction should be reversed. It is, I think, of importance that his opinion be known, for it demonstrates that three of the five appellate judges who have considered this case concur with the district judge who tried it that the injection into the trial of this statement of a prior arrest was error.

It is fundamental that counsel usually assumes the risk of unfavorable responses to his own cross-examination. But here it seems clear that appellant's counsel was surprised when the fifth government agent he had cross-examined testified to a conversation not foreshadowed by any prior witness; and that when he discovered that the agent might testify to an admission by the defendant of a prior arrest, he did his best to cut off the indicated testi-

mony and close the line of inquiry. The trial judge insisted that the witness complete the unfinished answer despite defense counsel's efforts to prevent reply. This case presents a situation unique on its facts. It seems clear that the testimony concerning the prior arrest came before the jury by accident rather than through any careless or designed "opening up" of a damaging conversation by defense counsel. Surely, therefore, as stated by Judge Hincks, the continuing narrative should not have been testified to.

Apuzzo did not take the stand in his own defense. In fact, the error occurred during the Government's case and before the defense put in any evidence at all, except by way of cross-examination.

I turn now to the question of whether the error was so prejudicial as to require, unless cured by the court's instructions, an automatic reversal of the conviction. Rule 52(a) of the Federal Rules of Criminal Procedure, as well as 28 U. S. C. §2111, admonishes us to disregard any errors or defects which do not affect substantial rights. This command is couched in clear language, but its application presents most difficult problems. See *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2 Cir. 1946) (majority and dissenting opinions), *cert. den.*, 329 U. S. 742.

The Supreme Court has stated the test as follows:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the

character of the proceeding, what is at stake upon its outcome and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. * * *

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno* v. *United States*, supra (308 U. S. 287), at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgement was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 1946, 328 U. S. 750, 762, 764-765.

Subsequent to this *Kotteakos* decision we have held that references to prior arrests or convictions, when the defendant does not take the stand and his character is not in issue, are prejudicial error. *United States* v. *James*, 208 F. 2d 424 (2 Cir. 1953); *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656 (2 Cir. 1947), *cert. denied*, 331 U. S. 831. These cases are authority for the proposition that such testimony is prejudicial error when it gets before the jury other than by deliberate or negligent conduct of defense counsel. This is so not because such testi-

mony is irrelevant "but because of a dominant policy which recognizes that what tends to show a likelihood that the accused has flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge." *United States* v. *James, supra,* at page 124. And see *Michelson* v. *United States,* 1948, 335 U. S. 469, 475-476. Obviously this is of particular importance when the prior arrest or conviction is for the same criminal activity.

With these guideposts at hand, I now turn to the overall situation at the trial, as I perceive it to have been.

To convict Apuzzo the Government had to convince the jury by circumstantial evidence and the proven overt acts of Aaron and Broussard that Apuzzo was in the "policy racket" with Aaron and Broussard during the period from July 28 through August 5, 1953. Though federal agents were in the butcher shop on five different occasions during those nine days and placed "policy" bets with Aaron and Broussard they never saw Apuzzo. Both Aaron and Broussard pleaded guilty prior to Apuzzo's trial. Broussard testified for the defense, and absolved Apuzzo of any connection with the "policy" operations. The Government presented a strong circumstantial case through the testimony of government employees tending to prove Apuzzo's complicity; and, although no direct evidence of day-to-day participation on the part of Apuzzo was ever before the jury, there was indeed sufficient evidence to support a finding by the jury of guilt.

Apuzzo's employees testified stoutly, also. If they were believed, there was similarly sufficient evidence to support

a verdict of acquittal. The defense could well maintain that there was insufficient credible proof of any "policy" participation by Apuzzo during the nine crucial days involved.

Although on the record before us it is highly probable that appellant may be guilty as charged, I do not find that this "record fairly shrieks the guilt," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953), of Apuzzo during the time-period involved, nor do I believe that no reasonable jury could have acquitted. See, *e.g.*, *United States* v. *Chieppa*, 241 F. 2d 635, 640 (2d Cir. 1957); *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (2d Cir. 1952) *cert. denied*, 344 U. S. 864.

Therefore, it becomes a most delicate question for an appellate judge who believes that the evidence below of guilt is not completely overwhelming to appraise the effect that Gianatasio's statement may have had. For Gianatasio let the jury know that Apuzzo, himself, allegedly had said to the witness that he had been arrested for "policy" about fifteen years ago. Even though instructed that the statement should be ignored, this statement, erroneously before the jury, could well be the decisive bit to convince a doubting juror of the defendant's guilt.[4]

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[4] See, *e.g.*, the oft-quoted concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949). "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F. 2d 54."

See also the remarks of the late Chief Judge Lehman of the New York Court of Appeals in *People* v. *Robinson*, 273 N. Y. 438, 445-46, 8 N. E. 2d 25 (1937).

Recognizing this danger, I nevertheless hold here that in view of the unique circumstances in this case this error was cured and made harmless by the subsequent considered and sincere instructions of the distinguished, able and conscientious judge. The error would never have occurred but for the insistence of Judge Dimock that Gianatasio complete his answer. This the jury well knew. The Judge accepted the entire blame for the occurrence and absolved defense counsel of any suspicion of deviousness. This also the jury well knew.

The erroneous introduction of an alleged statement by defendant that he had been previously arrested for a similar activity may be considered of such an exceptionally prejudicial character as to necessitate a new trial. See, *e.g.*, *United States* v. *James*, *supra*. But the general rule is that where evidence is erroneously admitted the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. *United States* v. *Giallo*, 206 F. 2d 207 (2d Cir. 1953), aff'd 346 U. S. 929; *United States* v. *Curzio*, 179 F. 2d 280 (3d Cir. 1950); *United States* v. *Marsh*, 82 F. 2d 703 (3d Cir. 1936); *United States* v. *Stoppelli*, 183 F. 2d 391 (9th Cir. 1950); *Samish* v. *United States*, 223 F. 2d 358 (9th Cir. 1955). I believe that the circumstances of this case warrant the application here of that general rule.

Appendix B

Order of Court of Appeals dated June 18, 1957

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVATORE APUZZO,

Defendant-Appellant.

Before CLARK, Chief Judge, and MEDINA, HINCKS, and WATERMAN, Circuit Judges.

On petition for rehearing.

Arnold D. Roseman, New York City,
for petitioner-appellant.

PER CURIAM.

Petition for rehearing denied. Motion for stay of mandate granted in accordance with and subject to the conditions of Rule 28(c) of this court, and bail continued in the present sum of $1500.

C. E. C.
H. R. M.
G. C. H.
S. R. W.
U. S. C. J.J.

Filed:
June 18, 1957

Appendix C

Judge Noonan's Opinion dated December 22, 1954

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 45-283

UNITED STATES OF AMERICA,

Plaintiff,

—against—

SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD,

Defendants.

MEMORANDUM

NOONAN, D. J.

This is a motion by the defendant, Salvatore Apuzzo, for an order directing the return of certain property, to-wit, books, papers, records, currency, etc., belonging to the defendant, which said defendant claims were unlawfully seized on August 5, 1953, by Agents of the Bureau of Internal Revenue, and directing that such property be suppressed as evidence.

The gist of defendant's claim is that the items seized are not contraband and were not "designed or intended for use or which has been used as the means of committing a criminal offense * * *."

If the defendant in this case was liable to an occupational tax as one who was engaged in conducting a lottery for profit, or collecting wagers for a person so engaged,

such liability could hardly be spelled out by the government without proof that in fact a lottery was being conducted. The same is true if his offense was failing to register. We are not here concerned with whether or not the operation of a lottery is, per se, a Federal offense. Congress, however, has seen fit to make it an offense for one to be engaged in such an endeavor without first paying the tax imposed by law, and registering as required.

It would seem from a reading of all of the papers before me that at least a portion of the seized items tend to indicate the carrying on of a lottery. If additional papers and documents not calculated to demonstrate that ultimate fact were seized, the defendant should specify which of the seized items he contends are not within the former category. A broad generalization to the effect that everything but the lottery slips taken by the agents relate to the butcher business is clearly insufficient.

It is my considered opinion that no useful purpose would be served by having a hearing at this time on the issue as to which papers do or do not relate to the lottery business, or which papers do or do not relate to the butcher business.

The rights of the defendant will be preserved because at the trial only such of the seized items as are relevant and material to the criminal charges would be received in evidence by the trial court.

The motion is, accordingly, denied. So ordered.

Dated, New York, N. Y. December 22, 1954.

GREGORY F. NOONAN
U. S. D. J.

Appendix D

Constitutional Provisions and Statutes Involved

Fourth Amendment, United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 26, United States Code,

"Sec. 2707. Penalties.

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this

subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

"*Sec. 3277. Liability of partners.*

Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax.

"*Sec. 3290. Tax.*

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

"*Sec. 3291. Registration.*

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

"*Sec. 3292. Certain provisions made applicable.*

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply."

"*Sec. 3294. Penalties.*

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * *

(c) Wilful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., ch. 521, Title IV, Sec. 471(2), 65 Stat. 529)."

Appendix E

Partial Compilation of Testimony

Guthrie	Lemler	Gianatasio
Q. I see. How about the other three men? A. No one had a revolver in their hands. Q. You are sure of that. A. Positive (19).	Q. And at any time did you put these firearms in your hand? A. I did, sir (27).	Q. Is it your testimony that he (Lemler) was holding a gun when he entered the premises? A. Yes, sir (p. 231, Original Record).
Q. You say he (defendant) was searched on that occasion? A. He was (p. 38, Original Record).	Q. Of all four. So that immediately everybody was asked to empty their pockets? A. That's right. Q. They were not searched, were they? A. It wasn't necessary. * * * Q. Your didn't search them, did you? A. No, I didn't (p. 153, Original Record). Q. Did you search him yourself? A. No. I had him remove the things from his pocket and place them on a desk. * * * (26).	Q. Were you present when Mr. Apuzzo was searched? A. Yes, I was (p. 190, Original Record). * * * Q. And Mr. Lemler frisked this defendant, didn't he? A. I think he did. I am pretty sure. Q. You are certain, aren't you? A. I am pretty sure. We always do those things (pp. 198-199, Original Record).
Q. What was his response to the questions in regard to what he was doing there? A. Mr. Apuzzo at the time of the initial questions stated he was just visiting here (p. 38, Original Record).	Q. What did you do then? * * * A. When we got there, I had all four of them identify themselves when other investigators were present. Mr. Apuzzo had a driver's license listing his name as Salvatore Apuz-	Q. Didn't you tell the jury that the defendant said he lived in the Bronx? A. That's correct. That's what he told me. Q. And you had his registration license right in front of you and he

Guthrie (cont.)

Q. What did you overhear? A. There was an additional question of Mr. Apuzzo as to what he was doing there, who he was. He identified himself * * * (21).

Q. Well, you say something happened. I mean if you thought you were being held up, you

Lemler (cont.)

zo at some Scarsdale address, and had $1300-some-odd on his person (25-26).

* * *

Q. In fact, you told him that, Mr. Lemler, because you knew he was the owner and this was his store? A. That's right (p. 162, Original Record).

Q. Did you see the defendant Apuzzo? A. I did.

Q. What was the look

Gianatasio (cont.)

said that? A. Positively (p. 200, Original Record).

Q. What was the nature of that conversation? A. Well, we asked Mr. Apuzzo his name and his address and asked him what he was doing there. He told us that his name was Apuzzo and he gave me a Bronx address and he said he was visiting in the rear (8a, Government's Appendix).

Q. Mr. Gianatasio, did you know before arriving at the premises on August 5, 1953, that he was the owner of the butcher shop? A. Yes, sir.

Q. You knew about it, didn't you? A. Yes, sir.

Q. Did you hear Mr. Lemler say to him (Apuzzo) "We know you are the owner of the premises," when he said he was a visitor? You didn't hear Mr. Lemler say that? A. No (p. 203, Original Record).

Q. Did these people seem surprised when you barged in? A. They didn't expect company.

Guthrie (cont.)

would either say something or put your hands up, or you would notice something. Did you notice these four men do anything? A. No, excepting that they were rather surprised at our entry naturally.

Q. Is that your testimony, that they were just surprised? A. However sir, let us say that they were surprised. That is as fa. as I could say. Of course, the fact that each of our agents and myself wore our badges on our lapels, that would have been an identification, of course, to most anyone.

Q. Would you use the word "startled"? A. Yes, very much so (pp. 91-92, Original Record).

Q. Had you seen this tie salesman showing his wares, and was his box open? A. His box was open on the table that I described before.

Q. And the ties were disarranged? A. The tie box was open.

Q. And was Mr. Apuzzo holding a tie in his hand? A. They were examining ties, evidently buying them (21).

Lemler (cont.)

on his face? A. Not any different than it is now.

Q. He didn't look startled? A. If he did, I didn't notice it.

Q. Did he look amazed? A. I don't recall.

Q. Did he look frightened? A. Not that I noticed (27).

Q. Did you see anything else besides the four men standing? A. Other than the makeshift office.

Q. Nothing else? A. Nothing else.

Q. That is your testimony? A. That's right.

Q. You didn't see any ties there, did you? A. There was a box I later learned had ties, yes.

* * *

Gianatasio (cont.)

Q. They looked startled? A. Yes, they looked startled when they saw the badges.

Q. Did they look startled when they saw the gun? A. They looked startled when they saw something. They were scared.

Q. That's the word, "scared" (p. 206, Original Record).

Guthrie (cont.)

Q. And Mr. Apuzzo told you he was the owner of this shop? A. He did not.

Q. When did you learn that he was for the first time? A. For the first time?

Q. In time? A. In time there was an admission of ownership.

Q. I said when did you first learn that Mr. Apuzzo owned this shop in time? A. When he made the admission thereto.

Q. And when was that? A. That was later that day at 143 Liberty Street.

* * *

Q. Did you ask anyone who owned the store? A. I asked Mr. Apuzzo.

* * *

Q. And did he tell you what he was there for? A. He was visiting.

* * *

Q. You asked him to

Lemler (cont.)

Q. It wasn't opened? A. It might have been.

Q. It might have been. Might Mr. Apuzzo have been holding one of the ties? A. I didn't see him holding any tie (p. 156, Original Record).

Q. What did you do then? A. I knew Mr. Apuzzo by sight when I entered the place prior to that. * * * I knew Mr. Apuzzo by sight before I had entered the premises.

* * *

Q. Did you search him yourself? A. No. * * * I asked Mr. Apuzzo how long he had been running this place, or words to that effect. He said he was operating—he leased the butcher shop. That's all he ran, that part of the business, was the butcher shop. * * *

* * *

Q. What did you do, Mr. Lemler? A. I announced myself as a Government officer. I directed all my questions to Mr. Apuzzo and—

Q. And the reason you directed them to Mr. Apuzzo, you knew he was the owner of the store? A. Oh, yes.

Gianatasio (cont.)

Q. Mr. Gianatasio, did you know before arriving at the premises on Aug. 5, 1953, that he was the owner of the butcher shop? A. Yes, sir.

Q. You knew about it, didn't you? A. Yes, sir.

Q. Did you hear Mr. Lemler say to him "We know you are the owner of the premises" when he said he was a visitor? You didn't hear Mr. Lemler say that? A. No.

Q. But you heard he was a visitor, that he said he was a visitor? A. Yes, sir.

Q. Mr. Lemler didn't say "We know you are the owner; is that right, and you didn't say "We know you are the owner"; is that right? A. That's correct.

* * *

Q. Did he (Lemler) tell you that Mr. Apuzzo

Guthrie (cont.)

open the safe, not knowing he was the owner of the store, is that right? A. That is right.

Q. But you did know he was the owner of the store when you asked him to open the safe, Mr. Guthrie, didn't you? A. A pretty good indication of the fact, yes.

* * *

Q. Now, Mr. Guthrie, you had a pretty good indication judging by your previous answer that he was the owner of the store when you asked him to open the safe, is that the fact? A. Uh, huh.

Q. I can't understand uh huh. A. Yes.

* * *

Q. Prior to entering the store you did not have any indication that this defendant owned the butcher store, did you? A. I did not, no.

Q. Half an hour after you entered you had a pretty good indication that he owned the butcher store, is that it? A. When you say "owned the store," I construe that as domination of the store.

* * *

Q. In effect? A. "Ernie, show them the

Lemler (cont.)

Q. You know before you went in there? A. That's right.

Q. Before? A. Before I went in.

Q. You didn't first find out afterwards, did you? A. No.

* * *

Q. And there came a point, Mr. Lemler, I think you said on direct testimony, that you told Mr. Apuzzo you were going to take the safe downtown, or put it in some warehouse, I think, you said? A. That's right * * *

Q. In fact you told him that, Mr. Lemler, because you knew he was the owner and this was his store? A. That's right

Q. And that was the fellow you were after? A. That's right (pp. 139-140, 151-152, 161-162, Original Record).

Gianatasio (cont.)

was the owner prior to your going to the store; yes or no? A. No.

* * *

Q. Did you question Mr. Apuzzo as the owner of the butcher shop; yes or no? A. Yes.

* * *

Q. Did you hear the defendant tell your partner Mr. Lemler that he was in the butcher business. Yes or no. A. Yes (pp. 203, 230-231, 237, Original Record).

Guthrie (cont.)

slips under the scale," and pointed to the scale, and that was it.

Q. And Mr. Broussard went over to the scale; is that right?' A. That is correct.

Q. At that time did you know the defendant was the owner of the store? A. No, sir, I did not (pp. 90, 97, 100-102, 135, Original Record).

Q. Was there a further conversation with Mr. Apuzzo after the safe had been searched? A. * * * We asked Mr. Apuzzo as to the location of any additional slips in the store. At that time he beckoned to Ernest Broussard, who was behind the counter, toward the front of the store, the north end of it, and said to Ernie—pointed to a scale on the counter and said, "Give them the slips."

* * *

Q. What did he say? A. He said, "Ernie, give them the slips in the scale," and pointed to the scale.

* * *

Q. In effect? A. "Ernie, show them the slips under the scale"

Lemler (cont.)

Q. Now, did you have a further conversation with Mr. Apuzzo after you finished searching the safe? A. Yes. I then told Mr. Apuzzo that I wanted the policy slips on the premises after the safe had been opened. He turned to the butcher, a gentleman named Broussard, I believe, and he pointed to a scale, probably three feet away from where we were standing, and he said, "Give him the slips."

* * *

(172) Q. Did you hear him discuss with Mr. Broussard that if there were any slips to please give them to the Federal officers?

The Witness: Would you mind repeating that question?

Gianatasio (cont.)

Q. Mr. Gianatasio, was there a conversation with regard to policy slips after you came out of the back room? A. Yes. Special Investigator Lemler asked Mr. Apuzzo, after he had opened the safe, he said to Mr. Apuzzo, "Where are the policy slips?"

So I heard Mr. Apuzzo say to Ernest Broussard, who was behind the counter, "Ernie, give him the policy slips in the bottom of the scale," pointing to the scale.

* * *

Q. What did the defendant say? A. The defendant said, "Ernie, pointing to the defendant Broussard and to the safe and the scale, he says, "Give them the slips from the scale."

Guthrie (cont.)

and pointed to the scale, and that was it (pp. 64-65, 110-135, Original Record).

Lemler (cont.)

Mr. Roseman: Read it, please.

(Question read.)

A. Well, he did instruct Mr. Broussard to give me the policy slips, as I related a few moments ago.

Q. Because that is what you were looking for, isn't that right? A. That's right.

Q. He never said "Those are my policy slips," did he? A. He pointed to the scale.

Q. After he spoke to Mr. Broussard, isn't that right? A. At the same time.

* * *

Q. Did Apuzzo point— A. He said, "Give the fellow the slips." He was pointing right to the scale. I was right there.

Q. Did he say there were slips in the scale? A. He said—

Q. Did he say there were slips in the scale? Yes or no, Mr. Lemler. A. No, sir.

Q. And you were saying he pointed, with no words? A. With words.

Q. What were those words, again? A. "Give this fellow the slips." "Give this guy the slips" —to be exact.

Gianatasio (cont.)

Q. Give them the slips? A. From the scale.

Q. From the scale? A. Yes.

Q. Did you tell that to the jury on Thursday? A. Well, I told them—

Q. "Give them the slips from the scale"? A. It was either in the scale, or from the scale, I just don't recall exactly.

Q. You don't recall whether it was "in" or "from"? A. Or "from." I don't recall exactly.

Q. Didn't you tell this jury on Thursday, "Ernie, give them the slips in the bottom of the scale"?

Mr. Leisure: I object to that question, your Honor, this type of cross examination.

The Court: Objection overruled.

Q. Did you say that to the jury on Thursday? A. I may have. I may have said that. I don't—

Q. In fact, if the stenographer read it back you would say you said it? A. Yes, sir, I would.

Q. Now, what was it, at the bottom of the

Guthrie (cont.)

Lemler (cont.)

Q. Meaning you? A. That's right.

Q. Didn't you tell this jury this afternoon, that Mr. Apuzzo said he didn't know about any slips in the store? Did you say that? A. That's right.

Q. Did you say that? A. That's right.

Q. I think you said it three or four times? A. Possibly (26, 31, 33).

Gianatasio (cont.)

scale, from the scale, in the scale, or what was it, Mr. Gianatasio? A. Well the slips were inside the scale.

Q. I didn't ask you that, did I? I said what was said. I didn't ask you where the slips were. I said what did you say that the defendant said? A. Well, whatever I have testified to, I testified to the best of my recollection.

Q. That is right, and what were the words that were used, "in the scale," "from the scale," or "at the bottom of the scale"? A. It may have been "in the scale," "from the scale," or "in the bottoms of the scale." I don't—I don't remember the exact words. It could have been either.

Q. It does not make any difference to you, does it? A. No, sir, it does not.

Q. Any of the words, that does not make any difference to you does it? A. As best I can recall, I try to testify.

Q. Don't you think it is important that you remember the words that were said by this defendant, Mr. Gianatasio? A. Yes, sir, I think so (35, 50-51).

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JOHN T. FEY, Clerk

No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1957

SALVATCRE APUZZO, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the Court of Appeals (Pet. 29-54) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1957 (R. 58a). A petition for rehearing was denied on June 18, 1957 (R. 69a). The petition for a writ of certiorari was filed on July 16, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by a reference at his trial to a prior arrest, where the jury was carefully and emphatically instructed to disregard the reference.

2. Whether the search and seizure of policy slips was legal.

STATEMENT

Petitioner was tried on two informations embodying three counts which charged failure to pay the special tax imposed on gamblers, failure to register as a gambler, and conspiracy to commit the mentioned crimes (R. 2-5). He was found guilty by a jury on all three counts and was sentenced to 60 days imprisonment and a $3,000 fine on the first count (R. 61-62, 65). Sentence was suspended on the other counts and petitioner was placed on probation for a period of four years (R. 62, 65-66).

The evidence may be summarized as follows:

Petitioner is the proprietor of a small butcher shop in New York City and has been in that line of business for many years (R. 31, 35, 52, 6a). His alleged conspirators, Aaron and Broussard, were employed by petitioner to work behind the counter during the day (R. 13, 52).

During the period from July 28 to August 5, 1953, federal agents placed eight policy number bets with Aaron and Broussard at petitioner's butcher shop (R. 7-11, 13-15). On each occasion, except one, there were other persons in the shop making "policy" bets

at the same time (R. 7-11, 13-15). Aaron would record the bets on slips of paper taken from a 3 x 5 inch pad (R. 7, 13). The previous day's winning number was posted on the end of the scales in the shop (R. 9). The agents never saw petitioner in the shop while they were there (R. 13). On one occasion, an agent saw one parcel of meat sold (R. 12).

A few hours after the eighth bet had been placed, four agents of the Treasury Department, acting under a validly issued search warrant (Tr. 432)[1], raided the shop (R. 18-19). They found petitioner in a back room (R. 20). Petitioner readily admitted his identity but at first maintained he was just a visitor to the shop (R. 26; 2a, 8a). Later, he stated that he had recently rented the store from another person (R. 26). Over $1300 was found on petitioner when he was searched. Several thousand money wrappers and hundreds of paper pads were in the back room (R. 2a, 5a).

The agents proceeded to the front of the shop where the safe was located and asked petitioner to open it (R. 7a). At first, petitioner claimed not to know the combination, but when the agents told him it would then be necessary to break the safe open petitioner recalled the necessary dial manipulations (R. 7a). The agents found over $10,000 in a locked compartment in the safe which petitioner immediately claimed (R. 22, 4a, 8a). Some policy slips record-

---

[1] The reference is to the transcript, which is on file with the record in this Court.

ing "78 individual plays" were found in another part of the safe, together with various business documents (R. 15-16).

The agents next asked for any other policy slips present in the shop. Petitioner pointed to the scale on the counter and told Broussard, who was behind the counter, to "[g]ive them the slips." Broussard removed about 150 "policy" slips from inside the scale, including the two bets made earlier that day by the agents, and handed them to the raiding party (R. 14, 17, 23, 25, 26, 50, 5a).

Petitioner stipulated at the trial that he had not registered as a gambler or paid the tax (Tr. 279-280), defending against the information on the theory that he had not known that his employees, Broussard and Aaron, were accepting bets in the butcher shop. Broussard testified that, at the time of the raid, petitioner told him to give the agents the policy slips if he, Broussard, knew about them (R. 53). There was testimony that on the day of the raid petitioner called one Isidori, his brother-in-law and employee, to obtain the safe combination, but Isidori also testified that petitioner already knew the combination (R. 55).

On direct examination, treasury agent Gianatasio, a member of the raiding party, was asked if he was present when any conversation was had with petitioner in the back room. Gianatasio answered responsively, testifying that petitioner had given his name and then said he was visiting in the store. On cross-examination, Gianatasio was again asked if he had had a conversation with petitioner in the rear of

the store. He answered affirmatively. The following exchange took place (R. 35-36):

> Q. What did you say to him and what did he say to you? A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx address. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before.
>
> Mr. ROSEMAN. At this time, your Honor—
>
> The WITNESS. You wanted to know what I asked him.
>
> Mr. ROSEMAN. All right.
>
> The COURT. At this time what?
>
> Mr. ROSEMAN. I don't want the witness to just keep answering. I would rather ask the questions.
>
> The COURT. You asked him what the conversation was. I didn't know that he had finished.
>
> Q. Did you tell Mr. Lemler—
>
> The COURT. Had you finished telling about the conversation?
>
> The WITNESS. No, sir.
>
> Q. Did you tell Mr. Lemler—
>
> The COURT. Just a minute. He didn't finish.
>
> A. When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago. He didn't know the exact date.
>
> Mr. ROSEMAN. At this time I object to the testimony and move for a mistrial.

The incident just mentioned took place at the close of a day's session. At the beginning of the next session, the trial judge told the jury—after hearing argument on a motion for a mistrial—that the previous arrest should not have been brought out and

that the judge had erred in insisting that the whole conversation be uttered. He instructed the jury that an arrest "means absolutely nothing," and has no bearing on the question of guilt or innocence. He concluded his remarks by saying (R. 49):

> * * * And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out.

After an initial hearing before a three-judge division of the court, the Court of Appeals heard the case *en banc*, four judges participating in the decision.[2] The opinions discuss the incident described *supra*, pp. 4-6. Judges Clark and Medina held that defense counsel had invited an answer which covered the whole conversation; that the entire answer was relevant and responsive; that counsel therefore could not complain of the substance of the answer he received; and that the entire answer was admissible under the doctrine of verbal completeness (R. 44a-49a). Judge Hincks was of the opinion that the trial judge's direction for a continuation of the answer was error, but that the error was not prejudicial because of the "massive weight of evidence pointing to guilt" (R. 49a-51a). Judge Waterman concluded that error had occurred but that the trial court's later instructions cured the error (R. 51a-57a).

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[2] Judge Frank, who had voted to reverse, died between argument and opinion. Judge Lumbard had served as United States Attorney during the prosecution, and disqualified himself.

ARGUMENT

1. All four judges of the Court of Appeals who participated in the ultimate decision agreed that, in the particular circumstances of this case, there was no prejudicial error to petitioner arising out of the agent's answer with respect to his prior arrest. While there was disagreement as to whether the District Court erred in requiring the witness to complete his answer, after defense counsel had attempted to cut off the full answer to his own broad question asking for the whole conversation, there was no disagreement that reversible error had not been shown.

For present purposes, we need consider only the ground taken by Judge Waterman, who rested his holding on "the unique circumstances in this case" (Pet. 54). Assuming that evidence of petitioner's prior arrest was erroneously admitted, the trial judge adequately cured the error. He forcefully advised the jury to disregard the testimony and gave full instructions that an accused person is presumed innocent until proven guilty, and that the fact of arrest does not tend to prove guilt. It must be presumed that the jurors followed this instruction, particularly in view of the scope and character of the judge's emphatic words (Pet. 38, 47, 48-49, 54). *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95. The trial judge's action was therefore appropriate, and he did not abuse his discretion in refusing to grant the motion for mistrial. See *McDaniel* v. *United States*, 232 F. 2d 713, 714 (C.A. 5); *United States* v. *Giallo*, 206 F. 2d 207, 209 (C.A. 2), affirmed, 346 U.S. 929; *Aeby* v. *United*

States, 206 F. 2d 296, 300 (C.A. 5), certiorari denied, 346 U.S. 885; *Cavness* v. *United States*, 187 F. 2d 719, 722 (C.A. 9), certiorari denied, 341 U.S. 951; *United States* v. *Curzio*, 179 F. 2d 380 (C.A. 3).[3]

Petitioner's argument that he was, in some way, "exposed to the wiles or toying of overzealous or vindictive government witnesses" (Pet. 24), is unfounded. None of the four appeliate judges accepted this contention (see Pet. 43). And in fact the government witness did not volunteer testimony which was unresponsive to the question asked him; the answer was actually responsive to defense counsel's broad inquiry on cross-examination. That the court did not immediately accede to counsel's attempt to limit his own original question does not alter the fact that it was not the witness, but defense counsel, who brought the whole of the agent's conversation with petitioner into the case.

2. Petitioner also contends that the warrant under which the government agents searched his shop and seized the policy slips was illegal. The gist of his argument is that the federal officers were attempting to obtain evidence of a state crime—operation of a lottery—which is not a federal offense, and that the items seized were neither contraband nor items "[d]e-

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[3] For these reasons, such cases as *Brown* v. *United States*, 83 F.2d 383 (C.A. 3); *Parilla* v. *United States*, 280 Fed. 761 (C.A. 6); and 23 C.J.S. Criminal Law § 1070, declaring that inadmissible testimony should be stricken, and *United States* v. *James*, 208 F. 2d 124 (C.A. 2), holding that the *prosecution* may not introduce evidence of prior arrest absent some good reason, do not apply at all to this case.

signed or intended for use or which * * * [had] been used as the means of committing a criminal offense * * *". Rule 41(b), Federal Rules of Criminal Procedure.

Prior to trial, petitioner moved for the return of the items seized at the time of the search. The motion was denied (Pet. 56-57) on the ground that, although operation of a lottery is not *per se* a federal offense, the operation of a lottery is a means of committing the federal offenses of evasion of the gambling tax or failure to register as a gambler. This ruling, which was accepted by the Court of Appeals without discussion, was clearly sound.

The search was not a general exploratory search for incriminating evidence.[4] It was conducted under a proper warrant, for the purpose of seizing items used in the commission of a crime. The tax upon the operators of a lottery is a constitutional exercise of the taxing power. *United States* v. *Kahriger*, 345 U.S. 22. While operation of a lottery is not, in itself, a federal offense, it is a federal crime to operate without first registering and obtaining a proper license. Therefore, the policy slips seized under the warrant were not mere evidentiary materials. They were being used to record bets and were "* * * the instrumentalities and means by which a crime [was

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[4] In *Kremen* v. *United States*, 353 U.S. 346, cited by petitioner, federal agents undertook a general exploratory search of the cabin occupied by Kremen (and the other petitioners), as an incident to their arrest, and made a wholesale seizure. Here, the search was pursuant to a proper warrant, and was not exploratory in nature; the seizure was limited.

being] committed * * *". *Harris* v. *United States*, 331 U.S. 145, 154; *Marron* v. *United States*, 275 U.S. 192; see also *Sanders* v. *United States*, 238 F. 2d 145, 147 (C.A. 10). As such, they were subject to seizure under Rule 41(b), *supra*.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

[5] In *United States* v. *Lefkowitz*, 285 U.S. 452, 465, involving a general exploratory search without a warrant, the Court noted that, "Though intended to be used to solicit orders for liquor in violation of the [National Prohibition] Act, the papers and other articles found and taken were in themselves unoffending." Here, as already noted, the policy slips taken under the warrant were actually being used in the commission of an offense. *Boyd* v. *United States*, 116 U.S. 616, holds that private papers are not subject to compulsory production equivalent to a search and seizure. The opinion mentions "lottery tickets" as an example of contraband which can be seized. 116 U.S. at 624.

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